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No. D

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In The
Supreme Court of the United States

ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, ET AL.,
Petitioners,

v.

MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 12, 2008

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth Circuit Court of Appeals erred in ruling that amendments to the Michigan Electrical Administrative Act ("MEAA") are not preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et. seq.*, despite the fact the statute mandates benefit levels and the manner of administration of an employee benefit plan without any legitimate alternative, thus furthering the split among the circuit courts between those that find preemption and those that fail to recognize that such state statutes necessarily interfere with ERISA's goal of national uniformity of employee benefit laws.

II. Whether the Sixth Circuit Court of Appeals erred and added to the confusion in the circuit courts of appeals concerning the use of a flexible standard for modifying judicial orders under Fed.R.Civ.P. 60(b)(5) as the Sixth Circuit's decision to allow the State of Michigan an inexplicable nine year filing delay in this case joins a handful of other circuit courts impermissibly relieving moving parties of their obligation to produce reasonable explanations for delays in filing 60(b)(5) motions.

PARTIES TO THE PROCEEDINGS

Petitioners, Associated Builders & Contractors, Saginaw Valley Chapter, along with Helm Electric, Inc., Hovey Electric, Inc., and Coleman Electric, Inc., were the Appellees-Cross Appellants before the Sixth Circuit Court of Appeals.

Respondents are the Michigan Department of Labor and Economic Growth and the Michigan Chapter of the National Electrical Contractors Association, which brought the underlying Fed.R.Civ.P. 60(b)(5) motion to dissolve injunction and, subsequently, were the Appellants-Cross Appellees before the Sixth Circuit Court of Appeals.

RULE 29.6 STATEMENT

Petitioners state that they are not a subsidiary or affiliate of a publicly owned corporation and there is no publicly owned corporation that owns 10% or more of their stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Associated Builders and Contractors, Saginaw Valley Area Chapter, et. al., ("ABC") respectfully petition this Court for a writ of certiorari to review the Judgment and Opinion of the Sixth Circuit Court of Appeals ("Sixth Circuit") entered in this case on September 16, 2008.

OPINIONS BELOW

The Opinion of the Sixth Circuit is published and referenced as *Associated Builders & Contrs. v. Mich. Dep't of Labor & Econ. Growth* ("MDLEG"), 543 F.3d 275 (6th Cir. 2008).

STATEMENT OF JURISDICTION

The Sixth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1001, *et. seq*. The judgment of the Sixth Circuit was entered on September 16, 2008. ABC has timely filed this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provisions involved in this matter are 29 U.S.C. §§ 1144(a) and (d) of the Employee Retirement Income Security Act ("ERISA") and M.C.L. § 338.883e (2) and (3) of the Michigan Electrical Administrative Act ("MEAA"). (See Appendix).

STATEMENT OF THE CASE

Amendments made to the MEAA in 1991 directly regulate ERISA apprenticeship benefit plans for all electrical contractors doing business in Michigan. The Sixth Circuit's decision that ERISA does not preempt these amendments misapplies and misinterprets this Court's prior ERISA precedent regarding mandated benefits. By failing to properly recognize and apply this Court's ERISA precedent to preempt the MEAA, the Sixth Circuit has validated a state law which binds employers to particular employee benefit structures and their administration without any legitimate alternatives, thus interfering with ERISA's core purpose of creating and maintaining national uniformity of benefit laws. The Sixth Circuit's misapplication of Supreme Court precedent not only impermissibly harms ABC members and their employees, but also continues a disturbing trend of circuit court cases refusing to preempt state laws that mandate ERISA plan benefits with no legitimate alternatives but compliance.

The Sixth Circuit further erred by applying this Court's "flexible standard" established in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), for modifying court orders. *Rufo* is clearly limited only to institutional reform cases so that application to this non-institutional reform case has impermissibly relieved the MDLEG of its obligation to produce a reasonable explanation for the nine year delay in the filing of its Fed.R.Civ.P. 60(b)(5) motion. To the extent some other circuits agree that *Rufo* may extend to cases such as this, there is confusion in the circuit courts which should be resolved.

Factual Background

In 1991, the MEAA was amended to add ratio and equivalency requirements to the apprenticeship provisions. The ratio provisions state:

> Except as otherwise provided in subsection (4), the ratio of electrical journeymen or master electricians to registered apprentice electricians shall be on the basis of 1 electrical journeyman or master electrician to 1 registered apprentice electrician. The Department of Labor or an enforcing agency shall enforce the ratio on a jobsite basis.

M.C.L. § 338.883e (2). The equivalency requirements state:

> The Department of Labor shall issue a certificate of registration to a person seeking registration upon satisfactory proof of the person's participation in a bona fide apprenticeship training program approved by the board. This program shall be equivalent to the requirements of those imposed by the United States Department of Labor Bureau of Apprenticeship and Training, subject to subsection (3).

M.C.L. § 338.883e (3). Under these amendments, an individual can work as an apprentice only if he or she participated in an apprentice program approved by the state and was trained under the prescribed 1-to-1 teacher/student ratio. M.C.L. § 338.883e (2) and (3). As a result, employers were forced into a "Hobson's Choice," that is, a choice between providing an

apprentice training program as the State of Michigan has mandated or not providing any apprentice training program at all.

ABC immediately sought injunctive relief barring enforcement of the ratio and equivalency requirements as preempted by ERISA. The district court agreed and issued a permanent injunction preventing the MDLEG from enforcing the requirements. *ABC v. Perry*, 817 F. Supp. 49, 52 (E.D. Mich. 1992). When the State did not appeal the decision and an intervening trade association attempted to do so, the Sixth Circuit dismissed the appeal for lack of standing. *ABC v. Perry*, 16 F.3d 688, 689 (6th Cir. 1994).

Proceedings Below

On May 5, 2006, some fourteen years after the district court granted the permanent injunction, the MDLEG filed a motion under Fed.R.Civ.P. 60(b)(5) to dissolve the injunction arguing that this Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 333 (1997), altered the analysis of ERISA preemption and swept away the legal premises of the 1992 district court's order. ABC responded that the motion was untimely and lacked merit. The district court concluded the case was timely and could proceed. As to the merits, the Court concluded that ERISA continued to preempt each of the two apprentice-training requirements. On appeal, the Sixth Circuit not only found the MDLEG's motion to have been timely filed, but also, that the MEAA was not preempted by ERISA.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision that the amendments to the MEAA are not preempted by ERISA runs afoul of a clear bedrock principle of preemption established by this Court. Specifically, ERISA always preempts laws that substantially and inescapably mandate employee benefit structures or their administration because such laws necessarily interfere with the uniform administration of benefit plans on a national scope. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). The Sixth Circuit has substantially narrowed the scope of ERISA preemption by joining with two other circuit courts of appeals which likewise fail to recognize that laws imposing inescapable mandates on ERISA plans are preempted. Moreover, the Sixth Circuit's decision directly conflicts with a case from the Eighth Circuit on virtually identical facts. *Minnesota Chapter of ABC v. Department of Public Safety*, 267 F.3d 807 (8th Cir. 2001). If allowed to stand, the Sixth Circuit's conflicting opinion from that of the Eighth (and of other circuits) will undoubtedly encourage proliferation of inconsistent regulations by states across the country so that employers operating in multiple jurisdictions will be burdened with a multiplicity of conflicting obligations to the ultimate detriment of plan beneficiaries. This is "exactly the burden ERISA seeks to eliminate." *Egelhoff* at 151. Review by this Court is therefore warranted, not only to correct the errors of the Sixth Circuit, but also to resolve the split of authority within the various federal circuit courts.

This case also raises important questions regarding the scope and application of this Court's decision in *Rufo*, *supra*. Despite this Court's clear directive in

Rufo that a relaxed standard for modifying judicial orders applies only in cases involving institutional reform litigation, the Sixth Circuit nevertheless improperly applied this flexible standard to the present case, thus relieving the Respondents of their obligation to produce a reasonable explanation for the nine year delay in the filing of their Fed.R.Civ.P. 60(b)(5) motion. In doing so, the Sixth Circuit has exacerbated an apparent conflict within the federal circuit courts between those which apply *Rufo's* flexible standard beyond institutional reform cases, and those which strongly indicate they do not. Thus, the negative consequences of the Sixth Circuit's erroneous interpretations of this Court's holding in *Rufo* can be averted only through review and correction by this Court.

I. REVIEW IS WARRANTED BECAUSE THE SIXTH CIRCUIT'S RULING THAT AMENDMENTS TO THE MEAA ARE NOT PREEMPTED BY ERISA, DESPITE THE FACT THE STATUTE *MANDATES* BENEFIT LEVELS AND THE MANNER OF ADMINISTRATION OF AN EMPLOYEE BENEFIT PLAN WITHOUT ANY LEGITIMATE ALTERNATIVE, FURTHERS THE SPLIT AMONG THE CIRCUIT COURTS BETWEEN THOSE THAT FIND PREEMPTION AND THOSE THAT FAIL TO RECOGNIZE THAT SUCH STATE STATUTES NECESSARILY INTERFERE WITH ERISA'S GOAL OF NATIONAL UNIFORMITY OF EMPLOYEE BENEFIT LAWS.

A. This Court has Universally Held That State Laws Mandating Benefit Levels or the Manner of Administration of ERISA Plans are Preempted Because They Necessarily Interfere With ERISA's Goal of National Uniformity of Employee Benefit Laws.

Enacted in 1974, ERISA "sets various uniform standards ... for both pension and welfare plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Pertinent to this case, ERISA explicitly includes "apprenticeship" programs within its statutory definition of covered welfare plans. ERISA § 3(1), 29 U.S.C. § 1002(1). Also pertinent to this case inasmuch as the amendments to the MEAA concern apprenticeship programs (a covered welfare plan), §514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a).

A law relates to an employee benefit plan under §514(a) "if it has a connection with or reference to such a plan." *Id.* at 96-97. A state law has a prohibited "connection with" an ERISA plan if it "mandate[s] employee benefit structures or their administration." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). Such laws include not only laws requiring plans to provide specific benefits, but also laws that require plans "to calculate benefit levels" differently from other states. *Id.* at 656. Thus, in order to prevent confusing or conflicting state regulations of such plans, ERISA preempts state laws mandating benefit levels of welfare plans.

The principle that ERISA preempts state laws mandating employee benefit levels because they interfere with nationally uniform plan administration was summed up in this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987):

> These statements [of ERISA's sponsors in Congress] reflect recognition of the administrative realities of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

After discussing how the goal of national uniformity would have been harmed absent ERISA preemption in two previous mandated benefits cases, *Alessi v.*

Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (striking down a New Jersey law offsetting worker compensation payments against pension benefits statute because it forced employers to accommodate conflicting regulatory schemes), and *Shaw* (striking down a New York law requiring parity between pregnancy benefits and other forms of disability benefits because the law required employers to pay specific benefits), this Court concluded at page 11 of *Fort Halifax*:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

In the Supreme Court's last definitive ruling on a mandated benefits case, the 2001 *Egelhoff* case, *supra*, this Court was asked to decide whether ERISA preempted a Washington statute voiding the designation of a spouse as beneficiary of a nonprobate asset. 532 U.S. at 142-143. The effect of the law was to require plan administrators to "pay benefits to the beneficiaries chosen by state laws, rather than to those identified in [ERISA] plan documents." *Id.* at 147. In finding the Washington statute preempted, this Court

ruled that the Washington statute had an impermissible "connection with" ERISA plans because it bound ERISA plan administrators to particular rules for determining beneficiary status, thus interfering with ERISA's core concern for nationally uniform plan administration. The Court held at 148:

> The Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co.* v. *Coyne,* 482 U. S. 1, 9 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different States.
>
> The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents.

As the foregoing decisions of this Court make clear, a state or local statute requiring a certain level of benefits or a certain manner of plan administration to an employee welfare plan covered under ERISA must be preempted by federal law in order to maintain ERISA's goal of national uniformity of employee benefit laws.

B. The Amendments to the MEAA are Preempted by ERISA Because They Mandate Employee Benefit Levels and the Manner of Administration of ERISA Apprenticeship Plans in Conflict With ERISA's Goal of National Uniformity of Benefit Laws.

The 1991 amendments to the MEAA, which impose particular training ratios and other regulations on apprenticeship plans of electrical contractors doing business in Michigan, are precisely the type of state law intended to be preempted by ERISA. This is so for three simple and obvious reasons. The MEAA amendments apply to employee welfare plans covered under ERISA, the amendments mandate particular benefit levels and plan administration to those welfare plans and, because they impose such mandates, the amendments frustrate ERISA's goal of national uniformity to such plans.

The MEAA amendments clearly apply to employee welfare plans covered under ERISA. This fact was recognized by not only the district court, *ABC v. Perry*, 817 F. Supp. at 50, but also by the Sixth Circuit which specifically ruled that "ERISA applies to [Petitioners'] apprenticeship programs because the programs are funded through separate funds, not out of the employer's general assets." *Associated Builders & Contrs. v. MDLEG*, 543 F.3d at 280.

It is also clear that the MEAA is a direct attempt by the State of Michigan to force electrical contractors to provide mandatory levels of plan benefits and to administer those benefits in a state-mandated way. While employers currently may provide on-the-job

apprentice training at teacher-student ratios set by their individual benefit plans, the 1991 amendments to the MEAA restrict the number of apprentice electricians an employer may employ on a work site by imposing a mandatory one-to-one teacher-student ratio. M.C.L. § 338.883e(3). Furthermore, under the amendments, employers may not even utilize apprentice workers unless they are enrolled in a state approved, *i.e.*, state regulated, apprenticeship program. M.C.L. § 338.883e(2).[1] Thus, the MEAA also

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[1] The Bureau of Apprenticeship and Training (BAT) was established by the National Apprenticeship Act of 1937 (also known as the Fitzgerald Act), 28 U.S.C. § 50. The Fitzgerald Act provides only for *voluntary* federal registration of apprenticeship programs for certain federal purposes. Illustrating the point, District Court Judge Cleland described the Fitzgerald Act in his 1992 decision as follows:

> If a given apprenticeship program qualifies for federal registration, the apprenticeship program may then be eligible to receive certain benefits, such as a federal grant. The Fitzgerald Act and the implementing regulations thus provide incentives designed to encourage those who maintain apprenticeship training programs to adhere to certain guidelines promulgated by the Department of Labor.... *ABC v. Perry*, 817 F. Supp. 49 at 53 (1992).

Since the Fitzgerald Act is an entirely voluntary system, employers who do not desire federal registration of their apprenticeship programs are free to ignore the applicable Department of Labor standards. Thus, the MEAA has incorporated by reference a purely voluntary federal scheme administered by the BAT and turned it into a state law mandating employee benefit plan benefits and methods of administration for all contractors doing business in Michigan.

mandates the manner in which the plan must be administered. M.C.L. § 338.883e(2).[2]

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[2] By requiring that Michigan apprenticeship programs "be equivalent to the requirements of those imposed by the United States Department of Labor, Bureau of Apprenticeship and Training ("BAT")," M.C.L. § 338.883e(2), the amendment incorporates a plethora of rules, regulations and requirements into the MEAA. For instance, there are regulations regarding the age at which one can become an apprentice (29 C.F.R. §§ 29.2 and 29.5); which occupations qualify as apprentice-type occupations (29 C.F.R. § 29.4); and how apprentices are to be selected from potential candidates (29 C.F.R. §§ 30.5 and 30.6). Once an apprentice has been selected, there are regulations which address the need for a written apprenticeship agreement and what it must contain (29 C.F.R. §§ 29.6, 29.10, and 5.5); the number of hours that an apprentice must actually work and how many hours of related instruction they must receive (29 C.F.R. § 29.5); and the proper teacher-student ratio (29 C.F.R. § 29.5). There are also standards for establishing the apprentice wage schedule, and how to address disputes regarding apprentice wages (29 C.F.R. §§ 29.5 and 5.11); as well as how to address complaints regarding the apprentice program itself (29 C.F.R. §§ 29.11 and 30.11). The rules also extend to the apprenticeship plan itself. There are no less than seven regulations regarding registration and de-registration of apprenticeship programs (29 C.F.R. §§ 29.3, 29.7, 29.8, 30.13, 30.14, 5.12 and 5.17). There are several provisions which address anti-discrimination and affirmative action requirements with which an apprenticeship program must comply (29 C.F.R. §§ 30.3, 30.4, 30.10, 30.17, 30.18). There is a regulation which establishes the records a sponsoring employer must maintain, and how long those records must be maintained (29 C.F.R. § 30.8). Last, but certainly not least, there are multiple provisions which address enforcement of the apprenticeship rules and regulations, and penalties for violating those standards (29 C.F.R. §§ 5.6, 5.7, 5.8, 5.9 and 5.10). By incorporating these regulations into the law, the MEAA amendments mandate and regulate virtually every aspect of an apprenticeship program.

The only way for employers to avoid the MEAA's reach is to terminate its apprentices and eliminate their benefit plan. The Sixth Circuit recognized as much in its Opinion, *ABC v. MDLEG*, 543 F.3d 275, 282 ("nothing short of discharging all of its apprentices will release an employer or a program from the reach of the [MEAA]"). Essentially, it is the State's way of training electrician apprentices or nothing! As it stands, an employer simply cannot utilize an electrician apprentice on any job site within Michigan unless they observe the teacher-student ratio and comply with the BAT-approved training regime. The effect of these statutory amendments on employers and their ERISA apprenticeship benefit plans cannot be overstated. By mandating the benefits and administration of these apprenticeship programs, small employers will, in many cases, be completely precluded from offering these benefits to apprentices, even their own sons and daughters. Many employers and potential apprentice workers in rural areas will not have access to BAT approved programs as mandated by the MEAA. Further, employers will no longer have a choice to utilize a training program tailored to their needs and business operations, but will be forced to forego individualized training for the standard, one-size-fits-all training mandated by the State.

Finally, and most importantly, because the amendments to the MEAA mandate benefit levels and dictate particular plan administration rules to electrical apprentice plans in Michigan, the amendments necessarily interfere with national uniformity. All electrical contractors working within Michigan's boundaries are now required to have apprenticeship training programs which meet the

specific requirements imposed by the State of Michigan. This includes out-of-state electrical contractors working in Michigan. These complex administrative regulations imposed on the apprentice plans of electrical contractors wishing to perform work in Michigan will undoubtedly cause some electrical contractors to stop doing business in Michigan to avoid the MEAA interference with their ERISA plans. What this Court has said in prior cases holds true in this case – requiring electrical contractors to comply with the MEAA's regulation of apprenticeship plans "imposes 'precisely the burden ERISA preemption was intended to avoid.'" *Egelhoff* at 150, citing *Fort Halifax, supra,* at 10.

Applying this Court's ERISA preemption jurisprudence to the MEAA leads to the inescapable conclusion that the 1991 amendments to that law not only mandate benefit levels and the manner of administration of an employee benefit plan, but also interfere with ERISA's statutory scheme of national uniformity. The MEAA therefore has an impermissible "connection with" an ERISA plan and should have been held as preempted by the Sixth Circuit.

C. Supreme Court Intervention is Necessary to Resolve a Split Among the Circuit Courts of Appeals, Some of Which Have Upheld State Laws That Mandate Benefit Levels and/or the Manner of Administration of ERISA Plans Without any Legitimate Alternative, Despite Inconsistency With ERISA's Goal of Attaining National Uniformity of Benefit Laws.

State or local enactments that mandate benefit levels and/or the manner of administration of ERISA plans are preempted because they necessarily interfere with ERISA's core goal of uniformity. *Shaw*, 463 U.S. at 105; *Egelhoff*, 532 U.S. at 148-151. On the other hand, as will be discussed *infra*, state or local enactments that purport to mandate benefit levels and/or the manner of administration of an ERISA plan, *but which provide plan sponsors with legitimate alternatives to compliance* are not preempted by ERISA because such laws do not interfere with national uniformity of fringe benefit plans. When called upon to interpret these principles, the circuit courts have created a split of authority, with each decision falling into one of two distinct camps. The first group includes those courts which properly recognize and apply these principles from *Shaw* and *Egelhoff*. The second group consists of those circuits, including the Sixth Circuit in this case, which completely fail to recognize and apply the principle that a state law which mandates benefit levels and/or the manner of administration of an ERISA plan without any legitimate alternatives, must necessarily be preempted as interfering with ERISA's goal of federal uniformity of fringe benefits law.

Travelers, supra, represents the seminal Supreme Court case demonstrating the point that state laws purporting to impose mandates on employee benefit plans are not preempted by ERISA (and do not interfere with ERISA's core concern of federal uniformity) if they provide legitimate alternatives to compliance. In *Travelers*, this Court reviewed whether ERISA preempted a New York statute requiring hospitals to impose a surcharge on patients whose hospital bills were paid by non-Blue Cross insurance

carriers. The non-Blue Cross insurance carriers challenged the statute, alleging the financial incentive created by the statute resulted in a "connection with" ERISA plans, thus requiring preemption. This Court found that the economic incentive designed to entice employers to utilize a particular insurance carrier did *"not bind plan administrators to any particular choice"* and, further, did not "preclude *uniform administrative practice* or the provision of a *uniform interstate benefit package* if a plan wish[ed] to provide one." 514 U.S. at 659-660 (emphasis added). Because the statute allowed for reasonable alternatives to compliance, specifically that plan sponsors could avoid compliance with the law by paying the surcharge, this Court held that ERISA did not preempt the New York law.

Less than two years later, this Court was asked in *Dillingham, supra,* to decide whether a California prevailing wage law requiring state public works contractors to participate in state-approved apprenticeship training programs, was preempted by ERISA. While the law certainly mandated compliance, it also allowed contractors to hire apprentices from unapproved plans but at a higher wage rate. Because the California law provided employers an opportunity to escape its mandates, this Court determined the law did "not bind ERISA to anything" and, therefore, was not preempted. *Id.* at 332. 519 U.S. at 332-33. Finding the effect of the California law virtually "indistinguishable" from the effect of the New York law in *Travelers, Id.* at 330, the Court concluded at 334:

> The effect of the prevailing wage statute on ERISA covered apprenticeship programs in California is substantially similar to the effect

> of New York law on ERISA plans choosing whether to provide health insurance benefits in New York through the Blues, or through a commercial carrier. ***The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans.*** *** We thus conclude that California's prevailing wage laws and apprenticeship standards do not have a "connection with," and therefore do not "relate to," ERISA plans.[3] (Emphasis added).

Comparing this Court's rules from *Shaw* and *Egelhoff* to its holdings in *Travelers* and *Dillingham*, a crystal clear rule emerges. A state law which purports to mandate ERISA benefit levels and which would otherwise be preempted under the analysis of *Shaw* and *Egelhoff* will, nevertheless, avoid ERISA preemption if that law provides legitimate alternatives to compliance. This is so because the Supreme Court recognized in *Travelers* and *Dillingham* that ERISA's core purpose of national uniformity of fringe benefits laws is not harmed by a state law which allows for legitimate alternatives to compliance because such laws do not actually "bind" ERISA plans to any particular regulation and, therefore, the need to invalidate such laws through ERISA preemption does not exist.

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[3] In both *Travelers* and *Dillingham*, this Court cautioned that there may be some economic incentives so strong as to constitute "a compulsion upon [an ERISA] program," thus constituting a "Hobson's Choice" for those subject to the state or local law – comply with the law or suffer substantially negative consequences. *Travelers* at 664 and *Dillingham* at 333.

In the wake of *Travelers* and *Dillingham,* several circuit courts of appeals have properly demonstrated their understanding of this Court's teachings. For example, in *Ferguson Electric Co. v. Foley*, 115 F.3d 237 (3rd Cir. 1997), the Third Circuit had to determine whether Pennsylvania's prevailing wage statute and its apprentice wage provisions were preempted by ERISA. The Third Circuit reasoned that Pennsylvania's statute did not actually bind ERISA plans to any particular set of benefit rules because, as in *Dillingham*, employers could avoid entanglement with the statute by paying higher wages to apprentices in unapproved plans performing work on prevailing wage projects in Pennsylvania. *Id.* at 241. By correctly recognizing and applying *Travelers* and *Dillingham's* instructions, the Third Circuit properly ruled that the Pennsylvania statute was not preempted by ERISA.

The Ninth Circuit also follows this Court's "legitimate alternatives" analysis from *Travelers* and *Dillingham*. In *ABC of Southern California v. Nunn*, 356 F.3d 979 (9th Cir. 2004), the Ninth Circuit reviewed certain amendments subsequently made to the same California apprenticeship law at issue in *Dillingham*. Specifically, the amendments established minimum wages and benefits for state registered apprentices. Citing to *Dillingham,* the Ninth Circuit held that the new amendments, like the underlying law in *Dillingham*, did "not bind ERISA plans to anything" because they afforded a legitimate alternative to compliance. Since the amendments did not actually mandate ERISA benefits and thereby avoid entanglement with national fringe benefits uniformity, the statute was not preempted by ERISA. *Nunn* at 985. See also, *Oregon Columbia Brick*

Mason's Joint Apprenticeship Training Committee v. Gardner, 448 F.3d 1082 (9th Cir. 2006).

The Eighth Circuit has also recognized that this Court distinguishes mandated benefit statutes on the basis of whether the statute provides legitimate alternatives to compliance. In *Minnesota Chapter of ABC v. Department of Public Safety*, 267 F.3d 807 (8th Cir. 2001) ("*Minn ABC*"), the Eighth Circuit reviewed a state law that mandated teacher-student ratios and forced other regulations on apprenticeship plans for sprinkler fitters with no legitimate alternatives to absolute compliance. The Eighth Circuit realized that this Court's *Travelers* and *Dillingham* "legitimate alternatives" analysis – which concerns purported mandates with valid alternatives to compliance – were inapplicable to the case before it.[4] The Court correctly understood that this Court's fringe benefit mandates

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[4] In this regard, the Eighth Circuit analyzed *Dillingham* in relation to the Minnesota law before it and reasoned at 267 F.3d 814:

> Thus, it is quite clear that the Minnesota statute and rules, ***unlike*** *the California law,* ***require*** *apprentice programs to comply with the Minnesota specifications.* The Minnesota statute and rules do more than merely encourage or provide economic incentives to contractors to hire apprentices who are registered in approved programs, the Minnesota statute and rules absolutely demand it. The statute unequivocally states that a "fire protection contractor may not employ a person to perform fire protection-related work unless the person is a managing employee, certified journeyman, or registered apprentice." Minn. Rule 7512.0900, subp 3. ***Thus, the Minnesota statute, unlike the California statute, "dictate[s] the choices facing ERISA plans."*** *Dillingham*, 519 U.S. at 334 (Emphasis added).

cases such as *Shaw, Alessi,* and *Egelhoff* (discussed supra in Argument I, A, pages 7-10) were directly applicable and controlling. Because the Minnesota law mandated ratios and other regulations to ERISA plans with no legitimate alternatives to compliance, the Eighth Circuit found that the Minnesota sprinkler fitter law was preempted by ERISA. *Id.* at 815-818.

In stark contrast to the statutes reviewed in *Travelers* and *Dillingham* (and in *Ferguson* and *Nunn*) which imposed mandates on employee benefit plans but also provided a legitimate alternative to avoid the State law's application, the MEAA directly mandates employers' benefit levels and plan administration without any alternative to compliance whatsoever. Unlike the surcharge in *Travelers* and the lower apprentice wage rate in *Dillingham*, each of which allowed employers or plan sponsors to avoid altering their ERISA benefit plans, the MEAA amendments are unavoidable and absolute without any legitimate alternatives to compliance. Unlike the health plan administrators in *Travelers* which could still operate with their ERISA plans intact, or the contractors in *Dillingham* who could still utilize apprentices at a higher pay rate on state government construction projects, electrical contractors under the dictates of the MEAA cannot employ any electrician apprentices on any job site within Michigan unless their apprenticeship plans comply with the State's mandates. As the Sixth Circuit aptly stated, "nothing short of discharging all of its apprentices will release an employer or a program from the reach of the Michigan statute." 543 F.3d at 282.

Against that backdrop, it is somewhat difficult to understand how the Sixth Circuit failed to apply the

foregoing black-letter ERISA preemption rules to the case at hand. It appears that the Sixth Circuit's error of law springs from its failure to recognize that the ratio and equivalency mandates of the MEAA must be preempted by ERISA because – like those laws at issue in *Shaw* and *Egelhoff* (and in the Eighth Circuit *Minn ABC* case) – the Michigan rules are *unavoidable* to electrical contractors in Michigan and, therefore, necessarily interfere with ERISA's core concern for national uniformity to fringe benefit laws. Misconstruing this Court's precedent, the Sixth Circuit invented a different test focused not on whether reasonable alternatives to compliance exist, but on whether or not fringe benefit mandates are aimed at fringe benefit plan structures or administration. *Id.* at 280. By failing to appreciate that mandates to ERISA plans with no legitimate alternatives *always* frustrate ERISA's concerns for national uniformity, the Sixth Circuit has not only created confusion to this Court's ERISA jurisprudence, but has also widened a growing split among the circuits.

Two other circuit courts suffer from the same kinds of misunderstandings plaguing the Sixth Circuit, and both were relied upon by the Sixth Circuit in its Opinion. The first is *Willmar Electric Service v. Cooke*, 213 F.3d 533 (10th Cir. 2000). There, the Tenth Circuit reviewed the potential preemption of a Colorado statute establishing a mandatory one-to-one supervision ratio for apprentice electricians. That law appears to be very similar to some of the MEAA amendments at issue in the present case, with the exception that the Colorado law did not invoke anything similar to the BAT equivalency standards the Michigan law requires. Despite the mandate of a particular student-to-teacher ratio requiring plan

sponsors to alter their apprenticeship plans with no legitimate alternatives to compliance with Colorado's law, the Tenth Circuit determined that the law fell "outside the area of ERISA's concern," that the statute "neither mandates nor limits the granting of benefits to employees," and that "the primary effect of the ratio requirement is to indirectly increase the cost of apprentice training." *Id.* at 537-538. In regard to the petitioner's argument that Colorado's ratio requirement interfered with ERISA's goal of national uniformity of fringe benefit plans because it did not allow employers any alternatives but to alter their apprenticeship plans to meet the dictates of the statute, the Tenth Circuit simply stated such interference was not substantial enough to require preemption. *Id.* at 539.

The other circuit court relied upon by the Sixth Circuit is the Eighth Circuit through its decision in *Wright Electric v. Minnesota Board of Electricity*, 322 F.3d 1025 (8th Cir. 2003).[5] There, an employer challenged a Minnesota statute mandating that "a licensed electrician shall not supervise more than two unlicensed persons at a job site." *Id.* at 1027. Instead of finding this law preempted because it mandated apprenticeship benefits without any legitimate alternative, the Eighth Circuit ruled that "the statute did not have a direct economic impact nor a direct impact on the structure of an apprentice program

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[5] The Eight Circuit previously had no difficulty in *Minn ABC* following this Court's distinction for preemption between those laws which mandate fringe benefit plans in contravention to ERISA's goals of national uniformity and those laws which provide legitimate alternatives to compliance, thus not binding such plans to anything. See page 20, *supra*.

because the statute merely increased the cost of training and did not dictate the number of hours, training methodology, or benefits . . . ." *Id.* at 1030. Unfortunately, the case provides little insight as to how the Court concluded the ratio law did not constitute a mandate to fringe benefit plans with no legitimate alternatives to compliance with the Minnesota law. Conspicuous in its absence, the Court also never reached the issue of whether the underlying statute interfered with national uniformity of fringe benefit laws.

Had the Eighth Circuit in *Wright*, the Tenth Circuit in *Willmar*, and the Sixth Circuit in the present case properly recognized that the statutes at issue mandated a specific benefit level or plan of administration without any legitimate alternative, they would have concluded that the statutes were preempted since the statutes necessarily interfered with ERISA's core goal of uniformity in the administration of benefit plans. By failing to recognize this principle, the Sixth Circuit, Eighth Circuit and the Tenth Circuit have caused a split not only among the federal circuit courts of appeals, but within the Eighth Circuit as well.

The uncertainty and split in the circuits regarding mandated benefits cases are not limited to apprenticeship training cases in the post-*Dillingham* area, but manifest themselves more recently in "pay-or-play" cases like *Retail Industry Leaders v. Fielder*, 475 F.3d 180 (4th Cir. 2007) and *Golden Gate Restaurant Association v City and County of San Francisco*, 2008 U.S. App. LEXIS 20574 (9th Cir. 2008). These cases, like the line of apprenticeship cases previously discussed, involve generally common

statutory fact patterns that require the courts to promptly identify and apply the legitimate alternative analysis of *Travelers* and *Dillingham*.

In *Fielder*, the Fourth Circuit reviewed a Maryland law which required certain employers to spend at least 8% of their total payrolls on employees' health insurance costs or pay the amount their spending falls short to the State of Maryland. *Id.* at 183. Examining this "choice," the Fourth Circuit concluded that this was no choice at all (*i.e.*, a "Hobson's Choice") and that "the only rational choice employers have under the [Maryland law] is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold." *Id* at 193. Since the Maryland law effectively mandated that employers structure their employee healthcare plans to provide a certain level of benefits without any legitimate alternative, and thus would "disrupt employers' uniform administration of employee benefit plans on a nationwide basis," the Fourth Circuit found the Maryland law to be preempted by ERISA. *Id.* at 194.[6]

However, a different result was reached on essentially the same facts in *Golden Gate*. There, the Ninth Circuit reviewed the San Francisco "Health Care Security Ordinance," which mandates that employers make required health care expenditures to or on behalf of certain employees. An employer failing to meet the required health care expenditures had to

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[6] See also, *Retail Industry Leaders Assn. v. Suffolk County*, 497 F.Supp.2d 403 (E.D.N.Y. 2007), in which the district court preempted a "pay or play" statute similar to the ordinance enacted by the State of Maryland in *Fielder*.

pay an equivalent amount to the City. Despite the factually analogous laws in *Golden Gate* and *Fielder*, the Ninth Circuit ruled the law not preempted by ERISA. The Court reasoned that the City-payment option offered San Francisco employers a realistic alternative to creating or altering ERISA plans and, as such, the ordinance did not "effectively mandate that employers structure their employee healthcare plans to provide a certain level of benefits." *Id.* at * 55.

This Court should grant certiorari in this case and reverse the Sixth Circuit's decision because that Court's decision has added to existing confusion and uncertainty to this Court's ERISA preemption jurisprudence. While several federal courts have adhered to the Supreme Court's teaching that unavoidable state law mandates to fringe benefit plans are preempted by ERISA in order to prevent a state-by-state hodgepodge of fringe benefit rules, the decision of the Sixth Circuit adds to a growing number of other federal court decisions which improperly validate state law mandates to fringe benefit plans with no reasonable alternatives to compliance with such laws. This disparity between the federal circuits obviously places ERISA's core concern for national uniformity in jeopardy. At a more localized level, the Sixth Circuit's ruling wreaks havoc for electrical contractors doing business in Michigan as those contractors are now required to alter their apprenticeship benefit plans to meet Michigan's rules and hope that any other jurisdictions within which they perform work do not require differing rules. Undoubtedly, as the law currently stands in the Sixth Circuit, electrical contactors must be vigilant to continually monitor and potentially modify their apprentice plans in order to meet various state and

local mandates to their plans. To require those employers to recognize and readily apply different rules based on the location of their work sites is to invite legal chaos into the body of welfare benefits preemption which Congress sought to synergize through passage of ERISA in 1974. Accordingly, in order to protect ERISA's core concerns for national uniformity, this Court should grant certiorari in order to halt the burgeoning split in the federal circuit courts of appeals caused by the Sixth Circuit's misunderstanding and misapplication of this Court's ERISA preemption precedent.

II. REVIEW IS WARRANTED TO CORRECT THE SIXTH CIRCUIT'S ERRONEOUS USE OF A "FLEXIBLE STANDARD" FOR MODIFYING JUDICIAL ORDERS UNDER FED.R.CIV.P. 60(b)(5) AND TO HALT THE ESCALATING CONFUSION IN THE CIRCUIT COURTS OVER THE USE OF SUCH A STANDARD IN NON-INSTITUTIONAL REFORM CASES.

Fed.R.Civ.P. 60(b)(5) provides that a court may, on such terms as are just, relieve a party from a final judgment, order, or proceeding if it is no longer equitable that the judgment have prospective application. This provision does not, however, give courts unlimited authority to fashion relief as they deem appropriate. Rather, relief through the Rule is to be granted "only upon an adequate showing of exceptional circumstances." *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (per curium) *cert denied*, 484 U.S. 836 (1987). Moreover, under Fed.R.Civ.P. 60(c)(1), a party bringing a Rule 60(b)(5) motion must do so "within a reasonable time." As the Sixth Circuit reiterated in its current Opinion at 278,

this requirement turns on the length of the delay, the explanations for the delay, the prejudice to the opposing party caused by the delay, and the circumstances warranting relief. Logically, where a motion is filed based on an alleged change in the law, as here, the court is to focus on whether the motion was filed within a reasonable time after the change in the law occurred. *Kalamazoo River Study Group v. Rockwell In't Corp.*, 353 F3d 574 (6th Cir. 2004).

Application of the foregoing factors to this case can result in only one rational conclusion – the State of Michigan did not file its motion "within a reasonable time." The State of Michigan predicated its 60(b)(5) motion on a change in ERISA law, specifically, *Dillingham, supra,*[7] which was decided in 1997. Yet, the MDLEG didn't file its 60(b)(5) motion until 2006 – nine years after the fact.[8]

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[7] For example, in its Brief in Support of its Motion to Dissolve Injunction before the District Court, the MDLEG characterized *Dillingham* this way:

> As explained above, the *Travelers/Dillingham* analysis has obviously created a significant change in the law of ERISA preemption. In its original decision here, this Court emphasized that ERISA's "preemption clause has a broad reach," pursuant to the teachings of *Shaw* and *Boise Cascade*. This must be contrasted with the U.S. Supreme Court's holdings in *Dillingham,* which rejected the "broad reach" approach where, as here, the state law involves an area of traditional state regulation .... ***This change cannot be understated. It is a 180 degree change from the Shaw/Boise Cascade standard.*** (Emphasis in original).

[8] This, of course, assumes that there has been a change in ERISA preemption law which, as Argument I makes clear, is not the case.

Incredibly, the State's "reason" for the delay as articulated by its Assistant Attorney General before the district court and as captured on the record (Transcript of 3/15/2007 Motion Hearing before District Judge Ludington, p. 5) was: "I don't know why there was a delay." (Jt. App 340 before Sixth Circuit). Beyond their inability to articulate any reason for the delay, much less a reason that would comport with Rule 60(b)(5), the State of Michigan, in what can only be characterized as an extreme example of governmental arrogance, essentially maintains that in its role as "protector of its citizens," the rules do not apply to them! (Third/Final Brief of MDLEG, p. 7) Ignoring these inconsequential "reasons" for excusing their nearly decade-long delay in filing their motion, and apparently buying into the MDLEG's argument that the federal court rules applicable to all other litigants don't apply to them because they are "the State," the Sixth Circuit granted the State of Michigan a free pass to re-litigate this case.

The Sixth Circuit never got around to addressing the "length of delay" requirement of 60(c)(1) because it couldn't say *when* this purported change occurred. All

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Although the MDLEG alleges that the Supreme Court's decision in *Dillingham*, *supra*, signals a shift in the analysis of ERISA preemption of state legislation, an analysis of ERISA preemption cases leading up to *Dillingham*, as well as the decision itself, reveals that *Dillingham* merely clarifies the two types of state regulation of apprenticeship training programs – those that are preempted because the regulations mandate a specific level of benefits or the manner of plan administration, and those regulations that are not preempted because they offer to apprenticeship plan sponsors for operating in a desired manner a "legitimate alternative."

the Court did say was that "one could imagine a State responding more quickly to these changes in the law," but that the difficult nature of ERISA preemption law qualified as a practical reason why delay might be excused in this case. ("Even today, the question of whether ERISA preempts these laws is not an easy one"). 543 F.3d at 279. Thus, not only did the MDLEG fail to adequately explain why it dozed for over nine years, but the Sixth Circuit never required the MDLEG to actually articulate a reason why its motion was not filed "within a reasonable time" as required by 60(b)(5). The Sixth Circuit essentially side-stepped any analysis of the reasons and circumstances for the delay and, instead, erroneously applied a flexible standard to this case in order to allow that State's case to proceed on its merits. It did so based on a misunderstanding of the United States Supreme Court's decision in *Rufo*.

In *Rufo*, this Court reviewed the standard to be applied to a request to modify a consent decree remedying unconstitutional jail conditions in a prison reform case. *Id.* at 374-75. The lower courts in *Rufo* had applied the strict "grievous wrong" standard enunciated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (i.e., a "clear showing of grievous wrong evoked by new and unforeseen conditions"). This Court, however, held that such a strict standard had not been codified into Fed.R.Civ.P. 60(b)(5) and, therefore, a flexible standard for permitting modifications of consent decrees was appropriate *in institutional reform litigation cases*.[9] The clarity of

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[9] This Court also cautioned that "the standard we set forth applies when a party seeks modification of a consent decree that arguably

this Court's limitation of a "flexible standard" only to reform litigation cases is plainly obvious from pertinent portions of its well-reasoned decision, but certainly no more striking than in its holding. The Court held at 502 U.S. 381 and again at 393:

> Although we hold that a District Court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a Court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree.
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> ***
>
> To conclude, we hold that the Swift "grievous wrong" standard does not apply to requests to modify consent decrees stemming from institutional reform litigation. Under the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the

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relates to the ***vindication of a constitutional right.*** *Id.* at fn 7 (emphasis added).

proposed modification is suitably tailored to the changed circumstance.

Twelve years after *Rufo,* this Court was presented the opportunity to reaffirm its rule that institutional reform cases are unique and are to be provided special treatment when analyzed under Fed.R.Civ.P. 60(b)(5). In *Frew v. Hawkins*, 540 U.S. 431 (2004), a group of mothers of children eligible for a state-administered Medicaid program sued the State of Texas for failing to provide certain services. The parties subsequently entered into a consent decree requiring the state to comply with numerous aspects of the Medicaid law. Years later, the plaintiffs sued to enforce the decree. Although the district court agreed that the State of Texas had violated the decree, the Fifth Circuit reversed finding the decree unenforceable under the 11th Amendment. Ultimately, this Court reversed the Fifth Circuit. In holding that the 11th Amendment did not prevent enforcement of the decree, the Court reasoned that the proper analysis to that institutional reform case was under Fed.R.Civ.P. 60(b)(5). Applying its *Rufo* standard, the Court determined that a consent decree administered by state officials involving ever-changing factual circumstances may be modified under a flexible, equitable approach. *Id.* at 441-442.

Despite this Court's limiting its flexible 60(b)(5) standard to only those cases involving institutional reform, as is plainly evident from the holdings of *Rufo* and *Frew*, the Sixth Circuit inexplicably concluded that the standard was meant to extend to virtually all cases involving "a matter of public interest." 543 F.3d 275, 278-279. Perhaps most telling of the Sixth Circuit's misapplication of *Rufo* is in the supposed quotation it gleaned from *Rufo* at the outset of its

Opinion. Without any explanation, the Circuit Court curiously omitted certain limitations imposed by this Court concerning the application of *Rufo's* flexible 60(b)(5) standard. At page 278 of its Opinion, the Sixth Circuit misquotes this Court in *Rufo* as follows:

> [T]he public interest is a particularly significant reason for applying a flexible modification standard because injunctions often "reach beyond the parties involved directly in the suit and impact the public's right to the sound and efficient operation of its [government]."

The *actual* quote from this Court is, however:

> [T]he public interest is a particularly significant reason for applying a flexible modification standard ***in institutional reform litigation*** because such decrees "reach beyond the parties involved directly in the suit and impact the public's right to the sound and efficient operation of its ***institutions***."

Rufo. at 381 (emphasis added). While it may arguably constitute excusable oversight for the Sixth Circuit to have omitted the language from *Rufo* limiting the flexible 60(b)(5) standard to only those cases involving institutional reform litigation, it is not excusable for the Sixth Circuit to have applied that standard to this present, non-institutional reform case. Indeed, the Sixth Circuit's impermissible extension of *Rufo* to the present case constitutes reversible error.[10]

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[10] The present litigation clearly does not fall within the definition of institutional reform litigation. This is simply a dispute

Unfortunately, the Sixth Circuit's decision adds to a growing list of courts which have impermissibly applied *Rufo* outside the context of institutional reform litigation. For example, in *Patterson v. Newspaper & Mail Deliverers' Union of New York*, 13 F.3d 33, 38 (2d Cir. 1993), the Second Circuit held that the flexible standard of *Rufo* "is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity." Instead, the flexible standard is appropriate whenever "a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature." *Id.* Some courts have even held that *Rufo* applies regardless of the context. *Bellvue Manor Associates v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999) (applying *Rufo's* standard to a dispute between private landlords participating in the federal rent subsidy program known as "Section 8 housing" and the United States Department of Housing and Urban Development ("HUD") concerning what method HUD may use to calculate annual rent adjustments);

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regarding whether amendments to a state statute are preempted by federal law. It does not involve the operation of any governmental institution, such as a prison or a school district, and there has been no ongoing monitoring of a governmental entity to ensure that the required change has taken place. Indeed, in the fourteen years between the issuance of the original injunctive order and the Respondents' Motion to Dissolve Injunction, this matter did not require the district court's attention on even one occasion. The Sixth Circuit's decision to extend *Rufo's* application is further erroneous because the present case does not vindicate any constitutional rights. In the present case, there is no claim that anyone's constitutional rights have been violated by any government action. Thus, the *Rufo* standard clearly does not apply to this dispute.

In re Hendrix, 986 F.2d 195, 198 (7th Cir. 1993) (holding that *Rufo* was the "coup de grace" for the *Swift* standard).

Contrary to the Second, Seventh, Ninth, and now the Sixth Circuit, other federal courts, including the First, Fourth, and Federal Circuit Courts of Appeals, have signaled an unwillingness to apply *Rufo's* flexible standard to cases outside the institutional reform litigation setting. See, *e.g.*, *Paul Revere Variable Annuity Ins. Co. v. Zang and Beck*, 248 F.3d 1, 7 (1st Cir. 2001) (reasoning that Fed.R.Civ.P. 60(b)(5) is reserved for "exceptional circumstances," and that *Rufo's* "flexible standard" was not applicable to a non-institutional reform case); *Small v. Hunt*, 98 F.3d 789, 795 (4th Cir. 1996) (applying *Rufo's* flexible standard to an institutional reform case under Fed.R.Civ.P. 60(b)(5)); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992) (refusing to extend *Rufo's* flexible standard to a case regarding commercial disputes.).[11] Accordingly, Petitioners assert that review by the United States Supreme

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[11] While the Sixth Circuit's extension of *Rufo*'s "flexible standard" to this case constitutes reversible error, the Sixth Circuit had, until this case, previously applied *Rufo's* relaxed standard of review only in cases involving institutional reform litigation which concern the vindication of constitutional rights, consistent with this Court's direction. *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992) (applying *Rufo's* standard in a school desegregation litigation); *Heath v. DeCourcy*, 992 F.2d 630 (6th Cir. 1993) (*relying* upon *Rufo* in a prison reform litigation); *The Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir 1994) (*applying Rufo's* standard in a public employment racial discrimination class action matter); and *Sweeten v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (applying *Rufo* standard to a parole reform litigation).

Court is warranted not only to correct the Sixth Circuit's error of law allowing the State of Michigan a free pass on its obligation to produce a reasonable explanation for its nine year delay in filing its 60(b)(5) motion, but also to halt the escalating confusion in the circuit courts over the application of *Rufo's* "flexible standard" for modifying judicial orders under Fed.R.Civ.P. 60(b)(5).

CONCLUSION

Petitioners, Associated Builders & Contractors, Saginaw Valley Area Chapter, et al., respectfully ask this Court to grant the Petition for a Writ of Certiorari to not only further define the application of ERISA preemption in a mandated benefits case, but also to avert the negative consequences of the Sixth Circuit's erroneous interpretation of this Court's black-letter ERISA and 60(b)(5) principles and to resolve the conflicts among the federal circuit courts of appeals concerning the important questions of federal law presented by this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-1639/1649/1654

[Filed September 16, 2008]

ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, et al., *Plaintiffs-Appellees / Cross-Appellants,*	)
v.	)
MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, et al., *Defendants-Appellants / Cross-Appellees.*	)

Appeal from the United States District Court for the Eastern District of Michigan at Bay City.
No. 91-10373—Thomas L. Ludington, District Judge.

Argued: July 23, 2008

Before: SUTTON and COOK, Circuit Judges; ROSE, District Judge.*

* The Honorable Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Dennis Raterink, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, John R. Canzano, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Appellants. David John Masud, MASUD, PATTERSON, SCHUTTER, PETERS & VARY, Saginaw, Michigan, for Appellees. **ON BRIEF:** Dennis Raterink, Richard P. Gartner, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, John R. Canzano, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Appellants. David John Masud, Katherine S. Gardner, MASUD, PATTERSON, SCHUTTER, PETERS & VARY, Saginaw, Michigan, for Appellees.

OPINION

SUTTON, Circuit Judge. "This is another Employee Retirement Income Security Act of 1974 (ERISA) pre-emption case," *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 808 (1997), one that asks whether ERISA preempts two provisions of a Michigan law governing the training of apprentice electricians. Because "the substantive standards to be applied to apprenticeship training programs are . . . quite remote from the areas with which ERISA is expressly concerned," and because of "the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state apprenticeship training standards," *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330–31 (1997), we hold that ERISA does not preempt the provisions.

I.

In 1990, the Michigan legislature imposed two requirements on the training and supervision of apprentice electricians. It required there to be a one-to-one ratio between trained electricians and apprentice electricians at all work sites. *See* Mich. Comp. Laws § 338.883e(3). And it established an "equivalency requirement" for the Michigan Electrical Administrative Board, which meant that individuals could be certified in an apprenticeship training program only if the program met the apprentice-training requirements imposed by the U.S. Department of Labor Bureau of Apprenticeship and Training. *See id.* § 338.883e(2).

In 1991, Associated Builders & Contractors, a trade organization, together with three of its members (collectively, "Associated Builders") filed this action against a state agency and its director (collectively, the "State"), claiming that ERISA preempted the ratio and equivalency requirements. The district court agreed and ordered the State to refrain from enforcing the requirements. *Associated Builders & Contractors v. Perry*, 817 F. Supp. 49, 54 (E.D. Mich. 1992). The State did not appeal the decision. (When an intervening trade association appealed the decision, we dismissed the appeal for lack of standing. *See Associated Builders & Contractors v. Perry*, 16 F.3d 688, 689 (6th Cir. 1994).)

Fourteen years later, in 2006, Michigan filed a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure to dissolve the 1992 injunction, claiming that intervening Supreme Court decisions had swept away the legal premises of the order.

Associated Builders responded that the motion was untimely and lacked merit to boot. The district court concluded that the State had filed the motion within a reasonable time and revisited the merits of the 1992 *decision. But it ultimately denied the State's request* for relief, concluding that, even though the relevant case law had changed in the intervening years, ERISA continues to preempt each of the two apprentice-training requirements.

II.

Associated Builders, as an initial point of dispute, argues that the State's Rule 60(b)(5) motion was untimely and thus should never have been considered on the merits in the first place. This aspect of the district court's decision receives abuse-of-discretion review. *See Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 905 (6th Cir. 2006).

Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court may dissolve an injunction if it "is based on an earlier judgment that has been reversed or vacated" or if applying the injunction prospectively "is no longer equitable." One predicate for altering an injunction or consent decree under the rule is a change in law—new court decisions or statutes that make legal what once had been illegal. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992); *Sys. Fed'n No. 91, Ry. Employes' Dept., AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (en banc).

A party bringing a Rule 60(b)(5) motion must do so "within a reasonable time," Fed. R. Civ. P. 60(c)(1), a requirement that turns on the length of the delay, the

explanations for the delay, the prejudice to the opposing party caused by the delay and the circumstances warranting relief. *See In re G.A.D., Inc.*, 340 F.3d 331, 334 (6th Cir. 2003). Also relevant is the nature of the dispute and whether it involves a purely private disagreement or a matter of public interest. "[T]he public interest is a particularly significant reason for applying a flexible modification standard" because injunctions often "reach beyond the parties involved directly in the suit and impact the public's right to the sound and efficient operation of its [government]." *Rufo*, 502 U.S. at 381 (internal quotation marks omitted).

The district court did not abuse its discretion in determining that the State filed its motion within a reasonable time. *One*, there has been a change in law. Ignoring for a moment the potential significance of *when* ERISA-preemption law changed—whether in 1997, as Associated Builders urges, *see* Fourth Br. at 4, or as late as 2004, as the State urges, *see* Third Br. at 5 & n.6—the fact remains that the law "has changed so that the enjoined behavior, which once might have been [preempted by] federal law, [may] no longer [be preempted] at all," *Sweeton*, 27 F.3d at 1166 (emphasis omitted). In *De Buono*, 520 U.S. at 813, the Supreme Court itself acknowledged differences between the Court's "earlier ERISA pre-emption cases" and its cases since *New York State Conference of Blue Cross & Blue Shield v. Travelers Insurance Co.*, 514 U.S. 645 (1995), and so have the lower courts, *see, e.g.*, *S. Cal. IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 927 (9th Cir. 2001); *Willmar Elec. Serv., Inc. v. Cooke*, 212 F.3d 533, 537 (10th Cir. 2000).

Two, this case plainly implicates a matter of public concern—a State's police-power interest in regulating the safety and training of new apprentice electricians—not simply a dispute between two private citizens. A court should not lightly deny a State's request to regulate a matter of public safety, particularly when the obstacle to the regulation rests on a legal foundation that may no longer be sound.

Three, while one could imagine a State responding more quickly to these changes in the law than Michigan did, there are practical reasons for excusing the delay. The district court issued the underlying injunction in 1992, and the first Supreme Court decisions suggesting a new way of viewing ERISA preemption cases came in 1997 when the Court decided *Travelers*, *De Buono* and *Dillingham*. But even the most sophisticated reader of ERISA case law could not claim with a straight face that a red light on regulating apprentice training before 1992 suddenly became green after 1997. In construing the "relate to" scope of preemption, the pre-1992 cases are as context-specific and as short on bright-line guidance as the post-1997 cases. Far from announcing a brave new line for ascertaining ERISA preemption, the post-1997 cases show only a willingness to place more emphasis on the presumption against preemption and on the underlying purposes of the ERISA statute—both of which give the States wider, but hardly unreviewable, berth in regulating the area. The last thing, indeed, that a purpose-driven approach to statutory construction guarantees is clarity. The key effect of permitting judges to generalize from the purposes of a statute, as opposed to just its text, is to give them more rather than less discretion in construing a law's scope.

Even today, the question whether ERISA preempts these laws is not an easy one. When Congress passes a law that is as plausibly and implausibly preemptive of a wide range of state laws as ERISA's "relate to" clause and when the courts understandably struggle to place state laws on one side or the other of the line, there is little reason to construe the "reasonable time" limitation in Rule 60 as a rigid statute of limitations. An unduly strict reading of the reasonable-time requirement, moreover, would tend to force premature Rule 60(b)(5) motions due to a State's fear of losing forever the opportunity to correct an injunction or consent decree. In the aftermath of the 1997 decisions, at any rate, state lawyers may well have questioned whether the cases ushered in a materially different view of ERISA preemption, or elected leaders in the legislative or executive branches in office in 1997 may not have agreed with the regulatory objectives of the laws preempted by the 1992 decision and therefore would have had no reason to ask the court to revisit the validity of its decision.

Four, Associated Builders has not pointed to any prejudice that the alleged delay caused it to suffer. The lapse in time gave the association and its members more time to be free of these allegedly burdensome regulations and more time for all concerned to see how other courts construed the 1997 Supreme Court ERISA decisions. All things considered, the district court did not abuse its discretion in accepting this Rule 60(b)(5) motion and in reaching the merits of the State's ERISA arguments.

III.

Does ERISA, as construed by the Supreme Court, require us to dissolve the injunction prohibiting enforcement of these two Michigan laws? Yes, and accordingly the State may now enforce them.

ERISA by its terms preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The statute defines an "employee benefit plan" as

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . .

Id. § 1002(1) (emphasis added); *see also id.* § 1002(3). While the "relate to" clause might at first glance seem to have an horizonless reach, *Travelers* counsels that "infinite relations cannot be the measure of pre-emption." 514 U.S. at 656. In ascertaining what state laws "relate to" ERISA-defined plans, *Travelers* tells us to "look . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*

Of particular relevance to today's dispute, *Dillingham* applied this text and *Travelers'* construction of it to a state law regulating apprentices. At stake was the validity of a California statute that required contractors who were awarded state public-works projects to pay their apprentices the local prevailing wage, unless the State had approved the apprenticeship program, in which case the contractors could pay a lower rate. 519 U.S. at 319. A law "relates to" an ERISA plan, the Court explained, if it has a "reference to" or a "connection with" a plan. *Id.* at 324. The law did not "refer[] to" an ERISA plan because it applied equally to training programs funded by a separate ERISA fund and those funded out of an employer's general assets. *Id.* at 328. Because the California law affected ERISA and non-ERISA plans alike, it did not "refer to" a plan. *Id.*

In holding that the law did not have a "connection with" an ERISA plan, the Court began "with the presumption that ERISA did not intend to supplant it," *id.* at 332, because "apprenticeship standards and the wages to be paid on public works have long been regulated by the States," *id.* at 330. It then reasoned that the California statute merely "alter[ed] the incentives, but d[id] not dictate the choices, facing ERISA plans." *Id.* at 334. Because contractors with apprenticeship programs could escape the statute's requirements by opting not to work on state public-works projects or by paying their apprentices the local prevailing wage, the statute did not "mandate[] employee benefit structures or their administration." *Id.* at 328 (internal quotation marks omitted). The law "merely . . . provide[d] . . . economic incentive[s]" to comply with the state law, which does not suffice to preempt it. *Id.* at 332.

In holding that ERISA did not preempt California's prevailing-wage law because it was optional, however, *Dillingham* did not draw the dispositive preemption line between laws that mandate something that potentially affects an ERISA plan and those that mandate nothing. The key distinction is between a statute that mandates or effectively mandates an aspect of law with which ERISA is concerned—i.e., a statute that mandates "employee benefit structures or their administration"—and a statute that does not. *See id.* at 328–34; *see also Air Transp. Ass'n of Am. v. City and County of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001). Illustrating the point, *De Buono* held that ERISA did not preempt a state gross receipts tax imposed on all hospitals in a State, including hospitals operated by ERISA plans, because the statute was "one of myriad state laws of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." 520 U.S. at 815 (internal quotation marks omitted). What is true of a general state tax is true of many other general state mandates that affect ERISA plans: They may "increase[] the cost of providing benefits to covered employees" and they may "have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute." *Id.* at 816.

Other cases, including *Dillingham* itself, support this distinction. *See* 519 U.S. at 328 (a statute that "mandate[s] employee benefit structures or their administration" satisfies the "connection with" test) (internal quotation marks omitted); *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (ERISA preempts a statute that "binds ERISA plan administrators to a

particular choice of rules for determining beneficiary status"); *De Buono*, 520 U.S. at 816 n.16 ("[T]here might be a state law whose economic effects . . . were so acute as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers and such a state law might indeed be pre-empted [by ERISA]."") (internal quotation marks omitted); *Travelers*, 514 U.S. at 658 ("In each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration."); *Retail Indus. Leaders Assoc. v. Fielder*, 475 F.3d 180, 192–93 (4th Cir. 2007) ("[A] state law has an impermissible 'connection with' an ERISA plan if it directly regulates or effectively mandates some element of the structure or administration of employers' ERISA plans.").

The "connection with" inquiry thus requires two showings to preempt a state law: (1) the law at issue must mandate (or effectively mandate) something, and (2) that mandate must fall within the area that Congress intended ERISA to control exclusively. *Cf. Dillingham*, 519 U.S. at 325 (looking "both to the objectives of the ERISA statute" and to the "*nature* of the effect of the state law on ERISA plans") (emphasis added and internal quotation marks omitted). Compulsion in other words is a necessary, but not a sufficient, condition for ERISA preemption. With these principles in mind, we turn to whether ERISA preempts Michigan's ratio and equivalency requirements.

IV.

The parties share some common ground in applying these lessons to Michigan's law. They agree that

ERISA applies to Associated Builders' apprenticeship programs because the programs are funded through separate funds, not out of the employers' general assets. *See Dillingham*, 519 U.S. at 326. And they agree that the ratio and equivalency requirements do not have a "reference to" ERISA plans: The rules do not "act[] immediately and exclusively upon ERISA plans" and thus do not depend on "the existence of ERISA plans [for their] . . . operation." *Id.* at 325. What separates the parties is whether the requirements have a "connection with" an ERISA plan—specifically (1) whether the state laws impose mandates on the training programs and (2) whether those mandates affect ERISA-regulated concerns.

A.

The ratio and equivalency rules plainly contain mandates. The ratio requirement provides that all apprentice electricians working in Michigan must register with the State's electrical administrative board and that the ratio of electrical journeymen or master electricians to registered-apprentice electricians at a job site must be one-to-one. The equivalency requirement provides that all apprentice electricians working in the State must participate in a training program approved by the board—i.e., a program with requirements "equivalent" to those imposed by the U.S. Department of Labor Bureau of Apprenticeship and Training. The U.S. Department of Labor, through the Fitzgerald Act regulations, in turn requires: a written apprenticeship agreement; a term of apprenticeship of not less than 2,000 hours; an outline of tasks in which the apprentice will receive supervised work experience; a numeric ratio of apprentices to journeymen consistent with proper

supervision, training and safety; a schedule of wages; adequate and safe equipment and facilities for training and supervision; and the assurance of qualified training personnel. *See* 29 C.F.R. § 29.5.

Unlike the statute in *Dillingham*, which merely offered an incentive to some apprenticeship programs, Michigan's statute imposes requirements on all apprenticeship programs. And nothing short of discharging all of its apprentices will release an employer or a program from the reach of the Michigan statute.

B.

Because the Michigan rules plainly mandate something, the question is whether that something falls within the scope of issues that ERISA prohibits the States from regulating. We think not for several reasons.

First, no one disputes that the States have long regulated apprenticeship standards and training or that this topic of regulation falls well within their traditional police powers. *See Dillingham*, 519 U.S. at 330–32. We therefore start with the presumption that Michigan's requirements fall outside of ERISA's preemptive reach. *Id.*

Second, the policies underlying the ratio and equivalency rules—the safety of electrical apprentices and appropriate standards of electrical apprenticeship —are "quite remote from the areas with which ERISA is expressly concerned." *Id.* at 330. ERISA "has nothing to say" about "the standards to be applied to apprenticeship training programs," and neither

"ERISA [nor] its legislative history [evinces] any intent on the part of Congress to pre-empt state apprenticeship training standards." *Id.* at 330–31.

Third, what triggers ERISA's potential application to these laws is not the existence of an apprenticeship training program, *see id.* at 326, but the existence of a separate fund to support the training program. Yet the allegedly preempted laws concern substantive apprenticeship training standards, not matters directly related to the fund, prompting us to wonder why Congress would want the States' public-safety authority to regulate substantive apprenticeship training standards to turn on how those plans are financed. We do not have an answer, and neither, so far as we can tell, does Associated Builders.

Fourth, under Associated Builders' theory, ERISA would prevent the States from regulating the safety of apprentices and the standards of electrical apprenticeship, even though ERISA does not regulate these matters either. And the Fitzgerald Act, which regulates just some of these issues, specifically allows and encourages what Michigan has done—most notably its adoption of some of the federal rules, a policy choice that generally will have a tendency to further nationwide uniformity rather than undermine it. Federal preemption, true enough, may in some settings further a regulatory vacuum that allows market forces to play out. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378–89 (1992). But no one maintains that ERISA—a law that hardly comes to mind as one encouraging market-based solutions—is that kind of statute, particularly as it relates to substantive apprenticeship training standards.

In authorizing the Secretary of Labor to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship" and to "promote the furtherance of labor standards necessary to safeguard the welfare of apprentices," 29 U.S.C. § 50, the Fitzgerald Act also undermines any suggestion that Congress sees no role for the States in regulating apprenticeship safety. The Act, indeed, suggests a direct role for the States in regulating those areas—a point of particular relevance because the same Congress that passed ERISA also amended the Fitzgerald Act to its current form. *See* Pub. L. No. 93-198, 87 Stat. 784 (1973). Just as the existence and continued enforcement of the two federal laws suggest a distinction between "the areas with which ERISA is expressly concerned" (i.e., "reporting, disclosure, fiduciary responsibility, and the like"), *Dillingham*, 519 U.S. at 330 (internal quotation marks omitted), and the areas with which the Fitzgerald Act is concerned (the safety of apprentices and the standards of apprenticeship), so they suggest that there is a distinction between ERISA's concerns and the Michigan apprenticeship rules' concerns.

Travelers reinforces the point. The Court reasoned that preemption of the New York statute at issue was particularly inappropriate because Congress, through the National Health Planning and Resources Development Act of 1974 (NHPRDA), Pub. L. No. 93-641, 88 Stat. 2225, had "sought to encourage" precisely what New York was attempting to accomplish through its statute, *Travelers*, 514 U.S. at 665. Yet by construing ERISA to preempt the state law, the Court "would have rendered the entire NHPRDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly

trying to induce them to do by enacting the NHPRDA." *Id.* at 667. A similar problem exists here: By construing ERISA to preempt Michigan's ratio and equivalency requirements, which embrace some of the Fitzgerald Act's apprenticeship requirements as the State's own, the court would hardly "promote the furtherance of labor standards necessary to safeguard the welfare of apprentices" and might well undermine the Secretary's ability "to cooperate with State agencies" and to "extend the application of [apprenticeship] standards." 29 U.S.C. § 50. "It is not," to be sure, "inconceivable for the ERISA Congress to intend the pre-emption of state statutes resulting from the pre-existing Fitzgerald Act," but the Fitzgerald Act and the analogy to *Travelers* do "aid our conclusion that Congress' silence on the pre-emption of state statutes that Congress previously sought to foster counsels against pre-emption here." *Dillingham*, 519 U.S. at 331 n.7.

Fifth, were it otherwise, ERISA might preempt all sorts of laws of general applicability that affect ERISA plans, a view that would preempt a slew of state laws regulating not just apprenticeship standards but also the medical profession, day care centers and the practice of law. *See* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" to include, among other things, a plan, fund or program established for the purpose of providing its participants "medical, surgical, or hospital care or benefits, . . . day care centers . . . or prepaid legal services"); *see also Travelers*, 514 U.S. at 661. Yet "[t]he bigger the package of regulation with indirect effects [on ERISA plans] that would fall on the respondents' reading of [ERISA's preemption provision], the less likely it is that federal regulation of benefit plans was intended

to eliminate state regulation of [the area]." *Travelers*, 514 U.S. at 661. No one seriously contends that Congress intended ERISA to preempt state laws that, say, permit only licensed physicians to perform certain medical procedures, *see, e.g.*, Mich. Comp. Laws § 333.17018, or state laws that require a person certified in CPR to be on duty when a day care center is providing care to a child, *see, e.g.*, *id.* § 722.112a, even though such statutes contain mandates affecting ERISA plans and thereby increase the cost of providing certain employee benefits. ERISA unsurprisingly has nothing to say about those matters—particularly when, as is normally the case, the hospital or day care center is not affiliated with an ERISA plan. *Cf. Travelers*, 514 U.S. at 661 ("[N]othing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern."); *Retail Indus.*, 475 F.3d at 191 ("States continue to enjoy wide latitude to regulate healthcare *providers*."). While a party might well wish to create a state-law-free zone around everything that affects an ERISA plan, "pre-emption does not occur if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *Travelers*, 514 U.S. at 661 (internal quotation marks and alterations omitted).

What makes Associated Builders' approach particularly odd is the freedom it would give employers to escape generally applicable state laws that have nothing to do with ERISA's concerns. If, for instance, an employer wanted to avoid the higher costs associated with using only licensed physicians and lawyers to perform medical and prepaid-legal services

for its employees, it simply could create an ERISA plan to pay for those services, then invoke ERISA preemption to duck responsibility for complying with the state laws. Indeed, the Minnesota Chapter of Associated Builders has figured out this perceived loophole: Its "promotional materials noted that if companies joined the foundation and paid for employee apprenticeship classroom training through a foundation trust account, they may be able to establish an ERISA plan and thereby be 'exempt from [supervision] ratios imposed by state and/or local governments.'" *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1027 (8th Cir. 2003) (alteration in original).

Sixth, we have some company in reaching this conclusion, at least with regard to the ratio requirement. In *Willmar Electric*, the Tenth Circuit concluded that ERISA did not preempt "a Colorado statute requiring apprentices performing electrical work in Colorado to be supervised on a one-to-one basis by licensed journeyman electricians." 212 F.3d at 534. In reaching that conclusion, the court reasoned that "[t]he subject of the Colorado law, like the California statute in *Dillingham*, is outside the area of ERISA's concerns" and that "*Dillingham* is particularly instructive here insofar as it suggests that ERISA's objectives are not interfered with by state regulation of substantive apprenticeship training standards." *Id.* at 537–58. The court also explained that, although the

> supervision standards may have some effect on [the] administration of [the plaintiff's] benefit plan, . . . this is [not] enough to overcome the presumption that Congress did not intend to

> supersede state regulation of this area of law. A similar effect on uniform plan administration would assuredly arise from the apprenticeship wage law in *Dillingham* and the state tax at issue in *DeBuono*, but the Supreme Court found no grounds for preemption in those cases.

Id. at 539. The Eighth Circuit reached the same conclusion in *Wright Electric*, agreeing with the Tenth Circuit that it is "implausible that Congress could have intended for such a regulation to be superseded by ERISA because its application has some impact on an ERISA plan." 322 F.3d at 1032 (internal quotation marks omitted).

That leads to one potential obstacle to this approach—at least with respect to the equivalency rules. In *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Public Safety*, 267 F.3d 807 (8th Cir. 2001), the Eighth Circuit held that ERISA preempts a Minnesota statute that resembles Michigan's equivalency requirement and that "required apprentices to be actively enrolled in a registered apprenticeship program and registered with a federal or state agency that approved apprenticeship programs," *id.* at 809. We are not, however, persuaded by its reasoning.

The lynchpin of the court's conclusion was its belief that Minnesota's statute, unlike the ratio requirement in *Willmar* or the wage requirement in *Dillingham*, did more than "indirectly increase the cost of the apprenticeship training"; it served "to actually prevent training [because a] fire protection contractor working in Minnesota [could not] hire an apprentice from an unapproved program." *Id.* at 815 (emphasis in

original). There are two problems with this reasoning. The first is that neither Minnesota's statute nor Michigan's statute prevents training; they prevent only certain types of training. The second is that, while the Michigan statute does prevent some methods of apprenticeship training, that does not mean that the law is preempted. To be sure, the Michigan law prevents some forms of training for the basic reason that the State does not want training that may result in injuries, overworking or shabby electrical work. But the question, as we have shown, is whether the statute mandates something with which ERISA is concerned, not simply whether it contains a mandate. *Cf. id.* at 820–21 (Bye, J., dissenting) (stating that the majority's view "reflects a more expansive view of ERISA preemption than that expressed by the Supreme Court in [*Dillingham*]" and noting that "nothing in ERISA attempts to preempt" all apprenticeship training programs). Indeed, as with state laws that undoubtedly will prevent ERISA-governed outfits from providing some forms of medical care, prepaid legal services and day-care services, state laws that prevent electrical contractors from providing some forms of apprenticeship training address matters that "are quite remote from the areas with which ERISA is expressly concerned." *Dillingham*, 519 U.S. at 330.

V.

For these reasons, we reverse.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-1639/1649/1654

[Filed September 16, 2008]

ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, et al., Plaintiffs-Appellees/Cross-Appellants,	)
v.	)
MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, et al., Defendants-Appellants/Cross-Appellees.	)

Before: SUTTON and COOK, Circuit Judges; ROSE, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green Clerk
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Number 91-10373-BC

[Filed April 3, 2007]

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation; COLEMAN ELECTRIC, INC., a Michigan Corporation; HOVEY ELECTRIC, INC., a Michigan Corporation; HELM ELECTRIC, INC., a Michigan Corporation,

Plaintiffs,

v.

DEPARTMENT OF LABOR AND ECONOMIC GROWTH; ROBERT SWANSON, Acting Director, Department of Labor and Economic Growth, State of Michigan;

Defendants,

v.

NATIONAL ELECTRICAL CONTRACTORS

ASSOCIATION MICHIGAN CHAPTER,)
)
Intervenor-Defendant.)
)

Honorable Thomas L. Ludington

OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE INJUNCTION, REJECTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, AND DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

In 1992, this Court issued an injunction, ordering the State of Michigan to "refrain from enforcing the ratio and equivalency requirements" of the Michigan Electrical Administrative Act of 1956 (MEAA), Mich. Comp. Laws §§ 338.881 *et seq.*, because they were preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq*. On May 5, 2006, Defendant Department of Labor & Economic Growth and its director, Defendant Robert Swanson, filed a motion to dissolve the 1992 Injunction under Federal Rule of Civil Procedure 60(b), based on a purported change in the decisional law regarding preemption under ERISA. Subsequently, this Court ordered supplemental briefing to better consider how the constitutional requirement for federal deference to state legislation – in the absence of federal preemption – related to Federal Rule of Civil Procedure 60(b), as well as the State's motion to remove a barrier to enforcing a duly enacted state statute.

Plaintiffs Coleman Electric, Inc.; Hovey, Electric, Inc.; and Helm, Electric, Inc., electrical contractors, and Plaintiff Associated Builders and Contractors, Saginaw Valley Chapter, a trade organization that provides instruction and training to apprentice electricians, opposed Defendants' motion. Intervenor National Electrical Contractors Association Michigan Chapter has joined in Defendants' motion to dissolve the 1992 Injunction and concurred in their arguments and filings.

I.

Enacted on Labor Day 1974, "ERISA is a comprehensive act designed to regulate employee welfare and pension benefit plans . . . ." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 357 (2003). Congress found that millions of employees were affected by employee benefit plans and found it important to ensure that employees and their beneficiaries actually received the benefits that they anticipated. *See* 29 U.S.C. § 1001(a). Among other things, ERISA sets standards for reporting, disclosure, and fiduciary responsibility for pension benefit and welfare benefit plans.

In 1992, Judge Cleland reviewed amendments to the MEAA, which Plaintiffs challenged as preempted by ERISA under 29 U.S.C. § 1144(a). The possibility for ERISA preemption occurs because the definition of an employee welfare benefit plan under ERISA includes "any plan, fund, or program . . . maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries,

through the purchase of insurance or otherwise, . . . apprenticeship or other training programs . . . ." 29 U.S.C. § 1002(1). The contested MEAA amendments applied to apprenticeship programs. Those amendments included an equivalency requirement (that apprenticeship programs meet requirements equivalent to those imposed by the federal Department of Labor) and a ratio requirement (that the ratio between licensed electricians and apprentice electricians generally be one-to-one, per jobsite). *See* Mich. Comp. Laws § 338.883c.

Relying on *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), because at that time "[n]either the Supreme Court nor the Court of Appeals for the Sixth Circuit ha[d] had occasion to consider [the issue]," the Court concluded that ERISA did preempt the state statute. *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 417 F. Supp. 49, 51 (E.D. Mich. 1992). The Court compared the preempted Minnesota statute from *Boise Cascade* to the MEAA and emphasized that Michigan's equivalency requirements did even more to establish minimum benefit levels and to restrict employers in determining how to train electrician apprentices than did the Minnesota statute. Based on this analysis, the Court ordered in the 1992 Injunction that the State of Michigan refrain from enforcing the challenged amendments of the MEAA. [Dkt #30].

On May 5, 2006, Defendants filed a motion to dissolve the 1992 Injunction under Federal Rule of Civil Procedure 60(b) because they contend that subsequent decisions clarify that ERISA preemption does not extend to the ratio and equivalency requirements for apprentices under the MEAA. On

June 29, 2006, Judge Lawson issued an order referring the motion to Magistrate Judge Charles E. Binder.

On October 26, 2006, the magistrate judge issued his report and recommendation. He recommended denying the motion, concluding that Defendants failed to seek relief from the 1992 Injunction within a reasonable time under Federal Rule of Civil Procedure 60(b)(5). He deemed unreasonable the delay between the filing of Defendants' motion to dissolve the injunction and the issuance of the referenced case law.[1]

Defendants timely filed objections to the report and recommendation, arguing that the magistrate judge erred in his analysis of the timeliness of their motion to dissolve the injunction. This Court set for hearing those objections to the report and recommendation and also directed supplemental briefing on the character of the relief granted by the 1992 Injunction and its subsequent status based on purported changes in the law. Plaintiffs filed a motion for reconsideration of the Court's order of January 17, 2007 that set Defendants' objections for hearing; Plaintiffs primarily took exception to the request for supplemental briefing on issues outside the scope of Defendants' request for review of the 1992 Injunction, based solely on Rule 60(b).

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[1] The magistrate judge noted that Defendants filed their motion nine to eleven years from the issuance of the cited Supreme Court decisions and two to six years from the issuance of the cited Court of Appeals decisions.

II.

The determination of a motion under Rule 60(b) is within the sound discretion of the trial court. *See Securities & Exchange Commission v. Johnson*, 143 F.3d 260, 263 (6th Cir. 1998). The party seeking to dissolve an injunction bears the burden of showing that a change in circumstances, either in fact or in law, warrants revisiting or modifying that injunction. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

III.

A.

Federal Rule of Civil Procedure 60(b)(5), in relevant part, provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [if] . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . . The motion shall be made within a reasonable time . . . .

Rule 60(b)(5) governs the modification and dissolution of injunctions. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 466 F.3d 391, 395 (6th Cir. (citation omitted). Although Rule 60(b) has now supplanted the standard for relief from judgment expressed in *United States v.*

Swift & Co., 286 U.S. 106 (1932), the Supreme Court there stated, "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Id.* at 114 (citation omitted). More recently, the Court has held, "[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Rufo*, 502 U.S. at 388 (citations and internal quotations omitted); *see also Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) ("[C]ourts have always had the inherent equitable power to modify consent decrees imposing ongoing injunctive relief.").

In *Sweeton*, 27 F.3d at 1166-1167, the Sixth Circuit stated:

> Ongoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.

Thus, an injunction premised on a subsequently unavailing legal basis is susceptible to dissolution, despite the importance of finality.

Further, the public has an interest in a flexible standard for modification of decrees that reach public institutions, because the effects of those decrees "reach beyond the parties involved directly in the suit and

impact on the public's right to the sound and efficient operation of its institutions." *Rufo*, 502 U.S. at 381 (citations and internal quotations omitted); *see also Ass'n for Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235, 1239 (8th Cir. 1991) (citation omitted) (noting the importance of federalism and comity in constraining remedies through a federal court).

Finally, a motion under Rule 60(b)(5) must be brought within a reasonable time. What is a "reasonable time" will depend on the circumstances of an individual case. *Smith v. Sec'y of Health and Human Services*, 776 F.3d 1330, 1333 (6th Cir. 1985); *see also Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 (6th Cir. 2006) (citation omitted). Possible considerations include facts particular to a case, such as the length and circumstances of any delay, prejudice to the opposing party from any delay, and the circumstances that compelled equitable relief. *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (citations omitted). Many Sixth Circuit cases that apply the "reasonable time" standard of Rule 60(b)(4) - (6) involve only private parties and a time span of months. Yet the Sixth Circuit did permit, in *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755 (6th Cir. 2002), without expressly addressing timeliness, a Rule 60(b)(5) motion to proceed that challenged – in 2000 – the application of a 1972 judgment about the ownership of a municipal utility.

In *Shakman v. City of Chicago*, 426 F.3d 925 (7th Cir. 2005), the Seventh Circuit reviewed a district court's denial of a motion to vacate a consent decree under Rule 60(b)(5), under circumstances very similar to those presented here. There, the city entered a

consent decree in 1983 that governed city hiring practices, and the city then challenged the decree in 2002. In particular, the city relied on a decision, that it contended represented an intervening change in the law, issued in 1987. The Seventh Circuit ruled that the denial of the motion as untimely was an abuse of discretion. "[A]ny consideration of a 'reasonable time' for filing a Rule 60(b) motion with respect to the 1983 [consent decree] must take into account the nature of that litigation as well as the resulting prejudice, if any, to the present elected officials and the public they represent." *Id.* at 934. Further, the failure to adopt a flexible standard to account for the unique circumstances involving public interest litigation constituted an abuse of discretion. *Id.* "Institutional reform litigation, and consent decrees attendant to that litigation, involve considerations of public interest and federalism that are not present in the run-of-the-mill civil case." *Id.* The Seventh Circuit then reversed the denial of the motion to vacate and remanded with instructions to consider the current state of the law, subsequent the entry of the consent decree. *See also Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003) (finding timely a Rule 60(b) motion filed over four years after entry of an injunction, although the party had actual notice in less than two months).

Based on the above-described legal standards, Defendants have properly filed a motion under Rule 60(b)(5), using an appropriate mechanism to challenge a purportedly inequitable judgment with ongoing application. Without question, the 1992 Injunction barring the enforcement of a duly enacted state statute has prospective application. *See Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 355 F.3d 574, 587

(6th Cir. 2004) (citation omitted) (stating that injunctions are prospective judgments susceptible to a Rule 60(b)(5) challenge). The elimination of the legal predicate on which that injunction issued – if so found – would create an inequity, because the people of the State of Michigan would be denied the benefit of their state statute. Indeed, under *Rufo* and *Sweeton*, courts have the authority to modify or dissolve injunctions when circumstances, including a change in the law, so require. Here, the 1992 Injunction issued because the Court concluded that the law – as decided at that time – required the preemption of a state statute by a federal statute. Yet if, as Defendants claim, the precedents regarding ERISA preemption have shifted, then the legal foundation for the 1992 Injunction may no longer exist. Continued enforcement by a federal court of an injunction against the enforcement of a state statute with, allegedly, no legal basis for that injunction strikes at the heart of federalism.

Additionally, courts must apply a more flexible standard to cases involving not only private litigants but public interests. Here, the parties in interest are not only those present before the Court, but the Legislature of the State of Michigan that enacted the enjoined statute and the people of the State of Michigan. The presence of these public interests, then, inform on the of timeliness of the motion to dissolve the injunction. Courts must consider the facts of each case in determining reasonableness, and the facts of this case implicate not only the parties, but the people of the State of Michigan and their elected officials. Although the Supreme Court and the Courts of Appeals issued the case law argued by Defendants up to eleven and six years ago, respectively, that length of time does not dictate that the motion to dissolve was

not timely filed. As in *Shakman*, where thirteen years passed between a change in the law and the filing of the motion to dissolve, the interests in federalism and of the public render the instant motion filed within a reasonable time. These interests differentiate this case from a "run-of-the-mill" civil case. Accordingly, this Court has the authority, under Rule 60(b)(5), to consider the substantive argument advanced by Defendants.

B.

As discussed above, the 1992 Injunction issued after the Court concluded that ERISA preempted the MEAA ratio and equivalency requirements. Defendants contend that subsequent changes in the decisional law dictate that ERISA no longer preempts the challenged MEAA provisions; Plaintiffs argue that, despite developments in ERISA precedents, the MEAA remains preempted.

At a hearing on March 15, 2007 which focused on the extent of the Court's authority under Rule 60(b)(5), the parties agreed that no more briefing on the substantive issues was warranted. The parties argued for holding an additional hearing regarding the substantive issue of ERISA preemption, which the Court did set, but the Court also reserved the right to reassess the value of an additional hearing. The Court has again reviewed the parties' submissions and concludes that further oral argument will not aid in the disposition of the motions. Accordingly, it is **ORDERED** that the motions be decided on the papers submitted. *See* E.D. Mich. LR 7.1(e)(2).

Today, as well as in 1992, 29 U.S.C. § 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [non-exempt] employee benefit plan . . . ." In 1992, to interpret the phrase "relate to," this Court relied on current decisions from the Supreme Court, i.e., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), as well as *Boise Cascade*, a 1991 decision from the Eighth Circuit. Since that time, the Supreme Court and several other circuits have further interpreted the preemption statute.

In *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 324 (1997), the Supreme Court considered a case that involved an ERISA preemption challenge to a state statute that implicated apprenticeship programs. More specifically, the California prevailing wage statute permitted contractors to pay a lower wage to workers who participated in a state-approved apprenticeship program. In determining whether the prevailing wage statute was preempted by ERISA, the Supreme Court underscored the breadth of "relate to" in 29 U.S.C. § 1144(a) and reiterated the phrase's meaning as applying to a law that either makes "reference to" or has "connection with" an ERISA plan. *See also Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 938-939 (6th Cir. 1997). For an apprenticeship program to have a reference to an ERISA plan, it must act "immediately and exclusively" on ERISA plans. *Dillingham*, 519 U.S. at 325. That is, the existence of an ERISA plan must be essential to the law's operation, such as when an ERISA plan is the source of funding for the apprenticeship program. *Id.* at 325, 327. Regarding

laws that had any "connection with" ERISA plans, the Supreme Court commenced its analysis from a presumption against preemption of an area of law long regulated by the states. *Id.* at 330-332. A state law that alters economic incentives – without dictating choices for plan administrators – does not create a sufficient connection to require preemption.[2] *Id.* at 332-334. Based on the fact that compliance with the California prevailing wage statute did not require an apprenticeship program, the Supreme Court concluded that ERISA did not preempt those state apprenticeship program requirements.

Subsequent to *Dillingham*, several circuits have also found certain state apprenticeship program statutes not preempted by ERISA, often emphasizing provisions that permit employers to elect out of state requirements, albeit at a cost. *See, e.g., Ferguson Electric Co., Inc. v. Foley*, 115 F.3d 237 (3d Cir. 1997) (Pennsylvania law that permits employers an exception to statutory prevailing wage rate and creates an incentive to hire apprentices from state-approved apprenticeship programs); *Willmar Electric Service, Inc. v. Cooke*, 212 F3d 533 (10th Cir. 2000) (Colorado statute that requires a one-to-one supervision ratio of licensed electricians to apprentices but permits "any person" – i.e., imposes no other requirement – to work as an apprentice electrician); *Wright Electric, Inc. v. Minnesota State Bd. of Electricity*, 322 F.3d 1025 (8th Cir. 2003) (finding Minnesota electrician statute

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[2] *See also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995) ("[A]n indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself").

indistinguishable from *Willmar*, in contrast to the Minnesota sprinkle fitter statute at issue in *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dep't of Public Safety*, 267 F.3d 807 (8th Cir. 2001)); *Associated Builders and Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004) (same California statute as in *Dillingham*); *Oregon Columbia Brick Masons Joint Apprenticeship Training Committee v. Gardner*, 448 F.3d 1082 (9th Cir. 2006) (Oregon statute that limits the number of state-approved apprenticeship programs to a geographic area's needs, though contractors need not hire state-approved apprentices).

Yet, in *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dep't of Public Safety*, 267 F.3d 807 (8th Cir. 2001) (hereinafter *Minnesota ABC*), the Eighth Circuit reviewed a state statute that required contractors to adopt state-approved apprenticeship programs and ruled the statute preempted by ERISA. The Minnesota statute permitted only licensed journeymen and registered apprentices to participate in fire protection work. The statute further required contractors to maintain an apprenticeship program approved by the state board and to register all their apprentices in an approved apprenticeship program. The statute also set out requirements for approved apprenticeship programs, including the duration of the program, the wage structures and scales for apprentices, the amount of hours of instruction, and the ratios for the registration of apprentices to journeymen. In contrast to the statutes at issue in *Dillingham* or in *Willmar*, the Minnesota statute dictated which persons could fulfill the work, including registered apprentices, but the state would register only apprentices from statutorily

governed apprenticeship programs. *Id.* at 815. Consequently, the court concluded that the statute did not provide only economic disincentives but dictated the terms by which apprenticeship programs could exist. *Id.* Based on the unique and mandatory provisions of the statute, the court concluded that ERISA operated to preempt that statute.

Similar to the scheme in *Minnesota ABC*, the MEAA sets out mandatory obligations on employers of electrical apprentices. Mich. Comp. Laws § 338.883e, in relevant part, provides:

> (1) An individual employed as an apprentice electrician shall register with the board on a form provided by the board within 30 days after employment.
>
> (2) The department of labor shall issue a certificate of registration to a person seeking registration upon satisfactory proof of the person's participation in a bona fide apprenticeship training program approved by the board. This program shall be equivalent to the requirements of those imposed by the United States department of labor bureau of apprenticeship and training, subject to subsection (3).
>
> (3) Except as otherwise provided in subsection (4), the ratio of electrical journeymen or master electricians to registered apprentice electricians shall be on the basis of 1 electrical journeyman or master electrician to 1 registered apprentice electrician. The department of labor

> or an enforcing agency shall enforce the ratio on a jobsite basis.

Apprentice electricians must register with a state board. That board may only approve apprentice electricians who complete a training program equivalent to the standards set forth by the Department of Labor. Further, on each jobsite, the ratio for apprentice electricians to more experienced electricians (either journeymen or master electricians) must be one-to-one. These equivalency and ratio requirements are just that – requirements – not elective matters that either apprentice electricians or their potential employers can elect out of, even by the payment of a financial expense.

Although these requirements would apply to any ERISA apprenticeship plan for electricians in Michigan, they do not act "immediately and exclusively" on ERISA plans. These MEAA provisions can operate without application to an ERISA plan, such as if a single employer operated an apprenticeship program out of that employer's general assets. Consequently, these provisions would not be preempted under the "reference to" prong of the test for preemption under 29 U.S.C. § 1144(a).

Yet, under the "connection with" prong, similar to *Minnesota ABC*, these provisions do more than create economic incentives. Rather, the MEAA provisions set out the conditions for existence of an electrician apprenticeship program and the terms for its continuance without incurring an action by the enforcing agency. Here, the state statute does dictate the choices of ERISA plan administrators by setting unavoidable obligations, so these provisions of the

MEAA do have a "connection with" an ERISA plan. Thus, under § 1144(a) and *Dillingham*, these provisions of the MEAA remain preempted.

Despite Defendants' ability to seek to dissolve the 1992 Injunction under Rule 60(b)(5), the developments in the case law do not result in an inequity in prospective application of this injunction. Consequently, the Court is not persuaded to dissolve the 1992 Injunction. Any subsequent changes in the law regarding ERISA do not alter ERISA's preemptive force on a state statute that mandates the obligations of an electrician apprenticeship program.

IV.

Accordingly, it is **ORDERED** that Defendants' amended motion to dissolve the 1992 Injunction [dkt #63] is **DENIED**.

It is further **ORDERED** that the magistrate judge's report and recommendation [dkt #85] is **REJECTED**.

It is further **ORDERED** that Plaintiffs' motion for reconsideration [dkt #95] is **DENIED** as moot.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: April 3, 2007

APPENDIX C

UNITED STATES CODE SERVICE
*** CURRENT THROUGH PL 110-448,
APPROVED 10/22/2008 ***
TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT
INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
ADMINISTRATION AND ENFORCEMENT

29 USC § 1144

Review expert commentary from The National Institute for Trial Advocacy

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [*29 USCS § 1003(a)*] and not exempt under section 4(b) [*29 USCS § 1003(b)*]. This section shall take effect on January 1, 1975.

(b) Construction and application.

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [*29 USCS § 1003(a)*], which is not exempt under section 4(b) [*29 USCS § 1003(b)*] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [*29 USCS § 1136*].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(5) (A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (*Haw. Rev. Stat. §§ 393-1* through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)--

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle [29 *USCS §§ 1021* et seq., *1101* et seq.], and the preceding sections of this part [*29 USCS §§ 1131* et seq.] to the extent they govern matters which are governed by the provisions of such parts 1 and 4 [*29 USCS §§ 1021* et seq., *1101* et seq.], shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph [enacted Jan. 14, 1983]), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 [*29 USCS § 1136*] with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 [*29 USCS §§ 1021* et seq., *1101* et seq.] and the preceding sections of this part [*29 USCS § 1131* et seq.].

(6) (A) Notwithstanding any other provision of this section–

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides–

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust

established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 [*29 USCS §§ 1002(1), 1003*] necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i) [*29 USCS § 1056(d)(3)(B)(i)*]), qualified medical child support orders (within the meaning of section 609(a)(2)(A)) [*29 USCS § 1169(a)(2)(A)*], and the provisions of law referred to in section 609(a)(2)(B)(ii) [*29 USCS § 1169(a)(2)(B)(ii)*] to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action–

(A) with respect to which the State exercises its acquired rights under section 609(b)(3) [*29 USCS § 1169(b)(3)*] with respect to a group health plan (as defined in section 607(1) [*29 USCS § 1167(1)*]), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [*42 USCS §§ 1396* et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 731 [*29 USCS § 1191*].

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b) [*29 USCS §§ 1031, 1137(b)*]) or any rule or regulation issued under any such law.

(e) Preemption of conflicting state regulations.

(1) Notwithstanding any other provision of this section, this title shall supersede any law of a State which would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement. The Secretary may prescribe regulations which would establish minimum standards that such an arrangement would be required to satisfy in order

for this subsection to apply in the case of such arrangement.

(2) For purposes of this subsection, the term "automatic contribution arrangement" means an arrangement–

(A) under which a participant may elect to have the plan sponsor make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B) under which a participant is treated as having elected to have the plan sponsor make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C) under which such contributions are invested in accordance with regulations prescribed by the Secretary under section 404(c)(5) [*29 USCS § 1104(c)(5)*].

(3) (A) The plan administrator of an automatic contribution arrangement shall, within a reasonable period before such plan year, provide to each participant to whom the arrangement applies for such plan year notice of the participant's rights and obligations under the arrangement which–

(i) is sufficiently accurate and comprehensive to apprise the participant of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average participant to whom the arrangement applies.

(B) A notice shall not be treated as meeting the requirements of subparagraph (A) with respect to a participant unless–

(i) the notice includes an explanation of the participant's right under the arrangement not to have elective contributions made on the participant's behalf (or to elect to have such contributions made at a different percentage),

(ii) the participant has a reasonable period of time, after receipt of the notice described in clause (i) and before the first elective contribution is made, to make such election, and

(iii) the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the participant.

APPENDIX D

MICHIGAN COMPILED LAWS SERVICE

*** THIS DOCUMENT IS CURRENT THROUGH P.A. 300, 10/08/08 ***

CHAPTER 338 PROFESSIONS AND OCCUPATIONS ELECTRICAL ADMINISTRATIVE ACT

MCL § 338.883e. Registration of apprentice electrician within prescribed time after employment; requirements for person who has participated in bona fide apprenticeship training program; ratio of electrical journeymen or master electricians to registered apprentice electricians; enforcement; residential single family dwelling or multifamily dwelling with prescribed restriction of units, enforcement of ratio.

Sec. 3e. (1) An individual employed as an apprentice electrician shall register with the board on a form provided by the board within 30 days after employment.

(2) The department of labor shall issue a certificate of registration to a person seeking registration upon satisfactory proof of the person's participation in a bona fide apprenticeship training program approved by the board. This program shall be equivalent to the requirements of those imposed by the United States department of labor bureau of apprenticeship and training, subject to subsection (3).

(3) Except as otherwise provided in subsection (4), the ratio of electrical journeymen or master electricians to registered apprentice electricians shall be on the basis of 1 electrical journeyman or master electrician to 1 registered apprentice electrician. The department of labor or an enforcing agency shall enforce the ratio on a jobsite basis.

(4) Notwithstanding subsection (3), in the case of a residential single family dwelling or a multifamily dwelling not exceeding 8 units per building, the department of labor or an enforcing agency shall enforce the apprentice electrician ratio on the basis of 1 electrical journeyman or master electrician to 2 registered apprentice electricians on a jobsite basis.

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(2)

No. 08-774

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

ASSOCIATED BUILDERS & CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, ET AL,
Petitioner,

v

MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, ET AL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

In 1992, the district court enjoined two provisions of apprenticeship training and education in the Michigan Electrical Administration Act (MEAA), relying on then existing Supreme Court precedent. After a change in Supreme Court law, Respondent petitioned the district court to dissolve the injunction. The district court declined, but the court of appeals reversed, holding that Michigan's regulation of apprentices and apprenticeship training programs is an area of traditional State regulation and that there is insufficient evidence that Congress's "clear and manifest purpose" in enacting ERISA was to preempt such State regulations. The questions presented are:

I. Whether Michigan's apprenticeship and training and education laws are preempted by ERISA when they (1) have no "reference to" ERISA plans; (2) constitute an area of traditional state regulation, thus qualifying for the presumption against ERISA preemption; and (3) mandate health and safety regulations, which is a subject matter outside the areas that Congress intended ERISA to control exclusively.

II. Whether the court of appeals, in ruling that the district court did not abuse its discretion, properly applied the "flexible standard" in determining that Respondent filed its Fed. R. Civ. P. 60(b)(5) motion in a "reasonable time" where the controversy involved a matter of substantial public interest.

PARTIES TO THE PROCEEDING

Respondent agrees with Petitioners' summary of the parties.

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The opinion of the court of appeals (Pet. App. 1a-20a) is reported as *Associated Builders & Contrs. V. Mich. Dep't of Labor & Econ. Growth,* 543 F.3d 275 (6th Cir. Mich. 2008). The opinion of the United States District Court for the Eastern District of Michigan, Pet. App. 23a – 39a, is reported as *Associated Builders & Contrs. V. Mich. Dep't of Labor & Econ.Growth,* 2007 U.S. Dist. LEXIS 24541 (E.D. Mich. 2007).

JURISDICTION

Respondent Michigan Department of Labor and Economic Growth (Respondent or DLEG) agrees with Petitioners Associated Builders & Contractors, Saginaw Valley Area Chapter, et. al. (collectively Petitioners or ABC) jurisdictional statement.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in Petitioners' Appendices C and D. Pet. App. 40a – 49a. The relevant federal court rule involved is Fed. R. Civ. P. 60(b) that provides:

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

INTRODUCTION

Responding to this Court's shift in analyzing Employee Retirement Income Security Act (ERISA)[1] preemption cases, Respondent asked the district court to

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[1] Employee Retirement Income Security Act. 29 U.S.C. § 1001, *et. seq.*

dissolve a 1992 injunction of two provisions of the Michigan Electrical Administration Act (MEAA) involving the training and education of apprentice electricians. These provisions require a one-to-one ratio between trained electricians and apprentice electricians at all work sites, Mich. Comp. Law § 338.883e(3), and establish an "equivalency requirement" requiring all apprentices to participate in an apprenticeship training program that is the equivalent to the requirements imposed by the U.S. Department of Labor Bureau of Apprenticeship and Training, Mich. Comp. Law § 338.833(2).

These provisions are not unlike numerous other licensing statutes that are designed to establish guidelines for various trades and professions. These statutes, which are enacted pursuant to the State's police powers, seek to protect the public safety by ensuring proper training and practice standards to prevent abuses and serve to protect both practitioners and consumers.

In 1992, the district court enjoined DLEG from enforcing these provisions on the grounds that ERISA preempted such statutes. The district court applied then existing governing law that ERISA preemption had a very broad reach and interpreted ERISA such that it preempted any State law that had a "connection with" or made any "reference to" an employee benefit plan.

In 1995, this Court first signaled a shift from broad application of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* [2] and later clarifying that shift

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[2] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995).

in *California Division of Labor v. Dillingham.*[3] The result is a presumption against preemption for state laws in areas of traditional state regulation due to the concept that that a State's powers are not to be superseded by ERISA unless that was the "clear and manifest purpose" of Congress.

The court of appeals correctly held MEAA's regulation of apprentices and apprenticeship training programs was an area of traditional State regulation, and that Congress did not evidence a "clear and manifest purpose" to supersede or supplant traditional State regulation of health and safety laws in enacting ERISA.

The claimed conflict among the courts of appeals is insubstantial. This is due to the general uniformity among the circuits on the issue of ERISA, and the presumption against preemption in the context of state laws regulating safety and training standards for apprentices. The sole conflicting decision, which was specifically discussed by the court of appeals below, is a 2001 Eighth Circuit decision. But the nature and extent of any conflict is uncertain due to a subsequent 2003 Eighth Circuit decision, which more nearly employs the same ERISA analysis used by the court of appeals below. Since the decisions of the Eighth Circuit are in flux, further review of this case by the Court is not warranted.

Finally, the court of appeals correctly held that the district court did not abuse its discretion and properly applied Fed. R. Civ. P. 60(b)(5) when it determined that it would rule on the merits of DLEG's motion to dissolve the injunction.

For these reasons, the Petition should be denied.

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[3] *California Division of Labor v. Dillingham,* 519 U.S. 316 (1997).

COUNTER-STATEMENT OF THE CASE

Facts and Proceedings

In 1991, the Michigan Legislature, seeking to assure safety at worksites, amended two provisions of the Michigan Electrical Administrative Act (MEAA)[4] that regulate apprenticeships. Those same two provisions are now challenged by the Petitioner. The first provision, referred to generally as the equivalency requirement, states:

> The department of labor shall issue a certificate of registration to a person seeking registration upon satisfactory proof of the persons' participation in a bona fide apprenticeship training program approved by the board. This program shall be equivalent to the requirements of those imposed by the United States department of labor bureau of apprenticeship and training, subject to subsection (3).[5]

The second provision, generally referred to as the ratio requirement, provides:

> Except as otherwise provided in subsection (4), the ratio of electrical journeymen or master electricians to registered apprentice electricians shall be on the basis of 1 electrical journeyman or master electrician to 1 registered apprentice electrician. The department of labor or an enforcing agency shall enforce the ratio on a jobsite basis.[6]

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[4] 1956 PA 271, Mich. Comp. Laws § 338.881 *et. seq.*

[5] Mich. Comp. Laws § 338.883e(2).

[6] Mich. Comp. Laws § 338.883e(3).

ABC argued that the ERISA preempted this State law and requested the district court to enjoin DLEG from implementing these provisions.

A. The District Court's 1992 Decision.

The district court granted ABC's request and issued a permanent injunction prohibiting DLEG from enforcing the two statutory provisions in question.[7] The district court held that the statutory provisions were invalidated by ERISA's preemption language, which states that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[8]

The district court relied principally on two cases involving ERISA preemption: the decision of the United States Court of Appeals for the *Eighth Circuit in Boise Cascade Corporation v. Peterson,*[9] and this Court's decision in *Shaw v. Delta Air Lines, Incorporated.*[10] The district court maintained these cases demonstrate that: (1) ERISA's "preemption clause has a broad reach" and (2) "the operative language of the preemption clause is the phrase 'relate to.'"[11]

The district court determined that Michigan's "ratio requirement" established the manner in which Michigan employers must train and utilize apprentice electricians, in effect mandating a minimum benefit

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[7] *Associated Builders v. Perry,* 817 F. Supp. 49 (E.D. Mich. 1992).

[8] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a).

[9] *Boise Cascade Corporation v. Peterson,* 939 F.2d 632 (8th Cir. 1991).

[10] *Shaw v Delta Air Lines, Incorporated,* 463 U.S. 85 (1983).

[11] *Perry,* 817 F.Supp. at 51.

level, and therefore "related" to ABC's apprenticeship plans. The district court also found that Michigan's "equivalency requirement" similarly established minimum benefit levels and restricted employers' ability to establish the manner in which to train apprentices, and, thus, also "related to" ABC's apprenticeship programs.[12] DLEG did not appeal the district court's 1992 decision.

B. The District Court's 2007 decision.

On May 5, 2006, DLEG, joined by the National Electrical Contractor's Association (NECA), filed a Motion to Dissolve the Court's Injunction, pursuant to Fed. R. Civ. P. 60(b)(5). DLEG argued that the district court's 1992 decision was predicated on case law that had since been superseded by this Court's subsequent decisions.

The United States Magistrate for the district court recommended that DLEG's motion be denied as untimely under the federal court rules, and thus did not issue a recommendation regarding the underlying merits of the motion. After reviewing DLEG and NECA's objections to the Magistrate's Report, the district court found that the motion was timely under the court rules but declined to dissolve the injunction.

The district court correctly noted that the only time requirement for motions filed under Fed. R. Civ. P. 60(b)(5) was that they be filed within a "reasonable time" and that "reasonable time" depended on the circumstances of the case. Pet. App.30a. The district court then determined that "the elimination of the legal predicate on which the injunction was issued – if found –

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[12] *Perry*, 817 F.Supp. at 52.

would create an inequity." Pet. App. 32a. With regard to the merits, the district court held that the Michigan statutory provisions remained preempted by ERISA because it "does dictate the choices of ERISA plan administrators by setting unavoidable obligations." Pet. App. 38a.

C. The 2008 Decision of the United States Court of Appeals for the Sixth Circuit.

On September 16, 2008, the court of appeals for the Sixth Circuit issued its decision in this case. Pet. App. 1a-22a. The court of appeals agreed with the district court that DLEG had filed its motion in a timely manner. Additionally, the court of appeals held that under this Court's current analysis, ERISA does not preempt the challenged MEAA provisions and thus reversed the district court and dissolved the injunction.

REASONS FOR DENYING THE PETITION

ABC attempts to portray this case as one that presents a "disturbing trend" regarding some federal courts' interpretation of the ERISA preemption clause. But no such trend exists. The court of appeals, employing a method analysis now used in all other circuits, determined that ERISA did not preempt Michigan's statutes. This decision was a straightforward application of this Court's decisions in *Travelers* and *Dillingham*.

As the court of appeals noted, no dispute exists that regulation of apprentices and apprenticeship training programs is an area of traditional State regulation. Moreover, Congress gave no indication of any intent in enacting ERISA "to pre-empt state apprenticeship training standards." Pet. App. 2a.

The cases ABC cites in its effort to demonstrate the existence of a circuit split on the issue of ERISA preemption of State laws regulating apprentice and apprenticeship training plans actually reveals, contrary to ABC's claim, a general uniformity by the circuits on the subject. Indeed, the alleged conflict that ABC points to, if there is one, has existed for years with no discernable negative impact on ERISA jurisprudence.

Likewise, there is no circuit split on the issue of what circumstances must exist for a State to seek relief from the onus of an injunction over its regulatory statutes under Fed. R. Civ. P. 60(b)(5).

I. The Sixth Circuit's opinion that ERISA does not preempt two provisions of the Michigan law governing the training of apprentice electricians does not warrant further review by this Court.

ABC's fundamental claim is that any State law pertaining to any type of employee benefit listed in ERISA necessarily regulates an employee benefit plan and therefore must be preempted. As the court of appeals determined, this claim fails because it contravenes the objectives of ERISA and is contrary to decisions by this Court.

A. This Court has emphasized that there must be some limitations placed on federal preemption.

This Court has often spoken of the importance of maintaining balance between concepts of federal preemption and State's rights, to ensure that each is given its proper respect.

This Court specifically recognized this concern in the area of ERISA preemption. "Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system."[13] "As we recently reiterated, '[preemption] of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."[14]

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[13] *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981).

[14] *Alessi*, 451 U.S. 522 (internal citations omitted).

B. This Court's ERISA preemption jurisprudence has evolved such that the District Court's 1992 injunction was no longer in conformity with this Court's holdings.

The controversy in this case flows from the fact that this Court's ERISA jurisprudence has undergone an analytical shift, beginning in 1995 and continuing to this day.

In 1992, when the injunction in this case was first entered, the governing analysis of the ERISA preemption clause was set forth in *Shaw*. This case stood for the general proposition that the ERISA preemption language was to be broadly construed, thereby creating a presumption in favor of preemption.

In 1995, ERISA's preemption jurisprudence underwent a considerable shift when this Court decided *Travelers*. This evolution continued in 1997, with the release of *Dillingham*. The consequence of these two decisions is that ERISA'a preemption language is no longer broadly construed.

1. In *Travelers*, this Court held that a proper analysis of ERISA preemption requires consideration of the objectives of ERISA and a respect for State laws involving historic police powers.

The *Travelers* case represented a shift in the Court's analytical framework in that it recognized that the ERISA preemption provision should not negate the Court's traditional views of preemption. *Travelers*

stressed that in areas of traditional State regulation, there was a presumption against preemption:

> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.
>
> * * *
>
> [W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[15]

This Court then explained that the key to ERISA preemption analysis was not to use an "uncritical literalism" but to look to the objectives of ERISA instead:

> [T]his still leaves us to question whether the surcharge laws have a "connection with" the ERISA plans and here an uncritical literalism is no more help than in trying to construe "relate to."
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> * * *
>
> For the same reasons that infinite relations cannot be the measure of pre-emption,

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[15] *Travelers*, 514 U.S. 645, 654-655, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230 (1947).

> neither can infinite connections. We simply must go beyond the unhelpful text and frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.[16]

Thus when resolving an ERISA preemption claim, this Court emphasized that "nothing in the language of the Act or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern."[17]

2. In *Dillingham*, this Court applied the *Travelers* standard to a case involving State substantive standards for apprenticeship training programs.

The next important step in the evolution of the ERISA preemption analysis and the most important in terms of apprenticeship regulation is *Dillingham*.

In *Dillingham*, Plaintiffs, who utilized apprentices in unapproved training programs, challenged a California statute alleging that it "relate[d] to" their apprenticeship program and was therefore preempted by ERISA. Reversing the lower courts, this Court held that the California prevailing wage statute *did not* "relate to" an ERISA plan. The Court began its analysis by explaining the two-step analysis under § 514(a): "Our efforts in applying the provision have yielded a two-part inquiry: a "law 'relate[s] to' a covered employee benefit

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[16] *Travelers*, 514 U.S. at 656.

[17] *Travelers*, 514 U.S. at 661.

plan for purposes of §514(a) 'if it [1] has a connection with or [2] reference to such a plan.'"[18]

This Court explained that the "reference to" analysis results in preemption "where a State's law acts immediately and exclusively upon ERISA plans. . . or where the existence of ERISA plans is essential to the law's operations. . . ."[19] This Court concluded that there was no "reference to" ERISA plans because an apprenticeship program could be maintained by a single employer and its costs could be paid out of an employer's general assets. This Court reasoned that since ERISA plans only include employee benefit plans funded through a separate fund, the California law was a law of general application and thus did not make "reference to" ERISA plans.

Next, this Court addressed the "connection to" standard. At the outset, this Court recognized that substantive apprentice standards were an area of traditional state regulation and therefore presumptively outside the scope of ERISA preemption:

> At the outset, we note that apprenticeship standards . . . have long been regulated by the States. . . . That the States traditionally regulated these areas would not alone immunize their efforts . . . *[T]he substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned – "reporting, disclosure, fiduciary*

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[18] *Dillingham*, 519 U.S. at 324, quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992).

[19] *Dillingham*, 519 U.S. at 325.

> *responsibility, and the like." A reading of 514(a) resulting in the pre-emption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say would be "unsettling." Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state apprenticeship standards . . . we are reluctant to alter our ordinary "assumption that the historic police powers of the States were not to be superseded by the Federal Act."*[20]

This Court then analyzed the California statute using this presumption. This Court reviewed the contents of the law to determine (1) whether it involved an area of traditional state regulation and, if so (2) its impact on ERISA's principal areas of concern such as reporting, disclosure, and fiduciary responsibility. Utilizing that analysis, this Court recognized that substantive regulation of apprentice training by the states is both an area of traditional state authority and one which has no impact on ERISA's principal areas of concern. Therefore the subject matter is not an area of state law that Congress intended to preempt in ERISA. This Court concluded that the California statute did not have a "connection with" ERISA plans.

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[20] *Dillingham*, 519 U.S. at 330-331, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230 (internal citations omitted; emphasis added).

C. The court of appeals' decision was correct.

Further review by this Court is unnecessary because the ruling below by the court of appeals was correct. This Court's decisions in *Travelers* and *Dillingham* has made clear that for any case involving potential ERISA preemption the following threshold question must be answered. Does the State law have a "reference to" or a "connection with" an ERISA plan?

The court of appeals below properly recognized that, for this case, the only real controversy presented was in regard to the "connection with" prong of the test. "[The parties] agree that the ratio and equivalency requirements do not have a "reference to" ERISA plans. Pet. App.11a-12a. With respect to the "connection with" prong, the court of appeals correctly applied *Dillingham's* "connection with" analysis for cases involving laws pertaining to apprentices. Pet. App. 12a-20a.

Applying these principles, the court of appeals held that Michigan's statutory provisions did not have an impermissible "connection with" an ERISA plan, for multiple reasons. The court of appeals correctly framed the issued noting that while "the Michigan rules plainly mandate something, the question is whether that something falls within the scope of issues that ERISA prohibits the States from regulating." Pet. App. 13a. Writing for the court, Sixth Circuit Judge Sutton then specified six things why the Michigan Rules are not prohibited by ERISA. Pet. App. 13a-19a.

First, because the regulations fall within traditional police powers there is the presumption that they fall outside ERISA's preemptive reach. Pet. App. 13a. Second, that "the policies underlying the ratio and equivalency rules – the safety of electrical apprentices

and appropriate standards of electrical apprenticeship – are quite 'remote from the areas with which ERISA is expressly concerned.'" Pet. App. 13a. Third, "the allegedly preempted laws concern substantive apprenticeship training standards, not matters directly related to fund." Pet. App. 14a. Fourth, that under Petitioner's theory "ERISA would prevent the States from regulating the safety of apprentices and standards of electrical apprenticeship, even though ERISA does not regulate these matters either." Pet. App. 14a. Fifth, that if Petitioner's claim was correct "ERISA might preempt all sorts of laws of general applicability that affect ERISA plans, a view that would preempt a slew of state laws regulating not just apprenticeship standards but also the medical profession, day care centers and the practice of law." Pet. App. 16a. The court of appeals further noted that:

> What makes [Petitioners] approach particularly odd is the freedom it would give employers to escape generally applicable state laws that have nothing to do with ERISA's concerns. [Pet. App. 17a.]

The Sixth and final factor in the court of appeals' analysis rejecting petitioner's claim of preemption was the court of appeals' conclusion that it was fully in line with the reasoning and analytical framework employed by other courts of appeal. Pet. App. 18a-19a.

The court of appeals' *Dillingham* analysis is supported by the fact that this Court has limited the enforcement of ERISA's preemption provision to cases where the State law "mandate" interferes with an area that Congress intended ERISA to control exclusively.

For example, in *Alessi*, this Court held that the New Jersey statute implicated a core concern: "ERISA permits integration of pension funds with other public income maintenance moneys for the purpose of calculating benefits . . . New Jersey's efforts to ban pension benefit offsets based on workers' compensation applies directly to this calculation technique."[21]

Similarly, in *Egelhoff v. Egelhoff,* this Court stated: "The statute . . . implicates an area of core ERISA concern. . . . In other words, unlike generally applicable laws regulating 'areas where ERISA has nothing to say,' which we have upheld notwithstanding their incidental effect on ERISA plans, this statute governs the payment of benefits, a central matter of plan administration."[22]

D. ABC's position would require this Court to return to the more expansive analysis of ERISA preemption utilized prior to *Travelers* and *Dillingham.*

ABC's framing of the argument ignores this Court's shift away from the strict construction of the ERISA preemption language. ABC would ask this Court to preempt any state law that contains a mandate, without any inquiry as to the rationale or the subject matter of the mandate.

The preemption of the State statutes at issue here in the manner argued by ABC could lead to the wholesale preemption of nearly all laws of general application. Obviously, this would not be in keeping with this Court's previous statements regarding laws of

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[21] *Alessi,* 451 U.S. at 524.

[22] *Egelhoff v. Egelhoff,* 532 U.S. 141, 147-148 (2001)(internal citations omitted).

general application: "pre-emption does not occur if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."[23] "Indeed, if ERISA were concerned with any state action – such as medical care quality standards or hospital workplace regulations – that increased costs of providing certain benefits, and thereby potentially affected the choices made by ERISA plans, we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing.[24] As the Eighth Circuit Court of Appeals noted, "[N]othing in ERISA attempts to preempt the entire field of health care or the regulation of professional standards for physicians."[25]

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[23] *Travelers*, 514 U.S. at 661 (internal quotation marks and alterations omitted).

[24] *Dillingham*, 519 U.S. at 329.

[25] *Shea v Esensten*, 208 F.3d 712, 719 (8th Cir. 2000).

II. The alleged conflict among the courts of appeals is insubstantial and uncertain and further review by this Court is not warranted.

A. The circuit decisions cited by ABC demonstrate a general uniformity on the issue of ERISA preemption of State laws regulating apprentices and apprentice training standards.

ABC argues that there is a split among the circuits regarding this issue. However, ABC review of these cases is fundamentally flawed since they are analyzed solely in terms of whether there is a "mandate" or "no mandate." But the correct analytical framework for assessing these cases is decidedly more detailed. This approach was accurately reflected in the court of appeals' analysis below, which faithfully adhered to this Court's holdings in *Dillingham* and *Travelers*.

The first inquiry must be whether the state law "relates to" an ERISA plan. If the answer is no, the next inquiry is whether the state law has a "connection with" an ERISA plan. The court of appeals identified this step, saying:

> "the 'connection with' inquiry thus requires two showings to preempt a state law: (1) the law at issue must mandate or effectively mandate something, and (2) that mandate must fall within the area that Congress intended ERISA to control exclusively. *Cf. Dillingham*, 519 U.S. at 325 (looking 'both to the objectives of the ERISA statute' and to the *'nature* of the effect of the state law on ERISA plans"). [Pet. App. 11a (emphasis added and internal quotation marks omitted).]

When viewed through this framework, the cases cited by ABC do not support the claim that there is a split among the circuits. ABC admits, as it must, that the Sixth Circuit's decision in this case is consistent with the Tenth Circuit's decision in *Wilmar Electrical Service v. Cooke*,[26] and the Eighth Circuit's decision in *Wright Electric Inc. v. Minnesota State Board of Electricity.* [27] Pet. Br. pp 21-24.

All three cases fall within the *Dillingham/Travelers* framework in that they involve State laws that: (1) have no "reference to" ERISA plans; (2) regard State apprenticeship training standards, an area of traditional state regulation, thus qualifying for the presumption against ERISA preemption; and (3) mandate health and safety regulations, which is a subject matter outside the areas that Congress intended ERISA to control exclusively. Accordingly, in all three cases, the courts found no ERISA preemption.

ABC cites four cases that it claims are in conflict with the cases cited above. The difficulty, for ABC, is that three of the four cases also fall within the *Dillingham/Travelers* framework: *Ferguson Electric Co. v. Foley*;[28] *ABC of Southern California v. Nunn*;[29] and *Oregon Columbia Brick Mason's Joint Apprenticeship Training Committee v. Gardner.*[30] Pet. Br. pp 19-20.

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[26] *Wilmar Electrical Service v. Cooke*, 212 F.3d 533 (10th Cir. 2000).

[27] *Wright Electric Inc. v. Minnesota State Board of Electricity*, 322 F.3d 1025 (8th Cir. 2003).

[28] *Ferguson Electric Co. v Foley*, 115 F.3d 237 (3d Cir. 1997).

[29] *ABC of Southern California v. Nunn*, 356 F.3d 979 (9th Cir. 2004).

[30] *Oregon Columbia Brick Mason's Joint Apprenticeship Training Committee v. Gardner*, 448 F.3d 1082 (9th Cir. 2006).

These three cases fall within the *Dillingham/Travelers* framework because they all involve State laws that: (1) have no "reference to" ERISA plans; (2) regard not State apprenticeship training standards, but the "state prevailing wage laws that incorporate them" *Dillingham*, 519 U.S. at 331, which also qualifies for the presumption against ERISA preemption; and (3) contain no mandate, as the statutes allowed for reasonable alternatives. Accordingly, in all three of these cases, the courts determined that there was no ERISA preemption.

Thus, when viewed under the proper framework, all six of the cited cases demonstrate a general uniformity on the issue of ERISA preemption that is consistent with this Court's holding in *Dillingham/Travelers*. In short, there is no indication of any widespread confusion or lack of uniformity in the Federal system with regard to the application of ERISA's preemption provision in the context of state laws that regulate apprentices. This case does not present the "compelling reasons" required by Supreme Court Rule 10 for grant of certiorari.

B. Even if a circuit conflict exists on this issue, this case presents a poor vehicle for resolution.

The sole case cited by ABC that might support a claim of conflict with the issue in this case is the Eighth Circuit's decision in *Minnesota Chapter of Associated Builders and Contractors, Incorporated v. Minnesota Department of Labor and Industry* ("*Minn ABC*").[31]

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[31] *Minnesota Chapter of Associated Builders and Contractors, Incorporated v. Minnesota Department of Labor and Industry*, 267 F.3d 807 (8th Cir. 2001).

But any conflict with the Eighth Circuit's decision in *Minn ABC* is, at best, insubstantial for several reasons. First, *Minn ABC* is wrongly decided. Second, *Minn ABC* was decided prior to the Eighth Circuit's subsequent decision in *Wright Electric,* which correctly applied this Court's ERISA preemption analysis. This calls into question whether the Eighth Circuit would decide *Minn ABC* the same way if it heard the case today. In any event since the decisions of the Eighth Circuit – and more specifically the manner in which ERISA preemption questions are analyzed– are in flux, further review of this case by the Court is not warranted. Finally, because the statute involved in *Minn ABC* is factually distinguishable from the Michigan provisions, such a fact bound case does not make a good vehicle for review.

1. *Minn ABC* was wrongly decided.

In *Minn ABC,* the Eighth Circuit, like ABC here, relied almost exclusively upon the presence of "mandates." Instead of focusing on the type of mandates involved, the court simply determined that because the Minnesota law contained mandates ERISA preempted these laws. The panel in *Minn ABC* also focused its analysis on the fact that the Minnesota statutes would act to prevent some types of training. As best stated by the court of appeals below: "state laws that prevent electrical contractors from providing some forms of apprenticeship training address matters that 'are quite remote from the areas with which ERISA is expressly concerned.'" Pet. App. 20a (citing *Dillingham,* 519 U.S. at 330).

Further, in *Minn ABC,* which was a split decision, the majority simply failed to faithfully adhere to this Court's analysis in Dillingham. This point was

underscored by the dissenting opinion that found the Minnesota law analogous to the Colorado law that was upheld by the Tenth Circuit in *Willmar*:

> I find the Tenth Circuit's logic and reasoning in *Willmar* persuasive, and disagree with the majority's attempt to distinguish it on the grounds that Minnesota's law actually prevents apprentice training. The substantive safety standards in Minnesota's statute and regulations are perhaps more comprehensive that the Colorado law set out in *Willmar*, but that is a difference in degree, not in kind. Both sets of laws have the same effect on ERISA plans; both indirectly increase the cost of apprentice training in order to comply with substantive safety standards set by the state, but neither 'mandates nor limits the granting of benefits to employees. [citing *Willmar*, 212 F.3d at 538] Likewise, both function as laws of general applicability, indiscriminately requiring safety standards for ERISA and non-ERISA apprenticeship training programs alike.[32]

Thus, from the date *Minn ABC* was issued, there was already a question about whether the Eighth Circuit applied the correct analytical framework under this Court's ERISA analysis, as set forth in *Travelers* and *Dillingham*.

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[32] *Minn ABC*, 267 F.3d at 821.

2. The Eighth Circuit decided *Minn ABC* prior to its decision in *Wright Electric*.

The question whether the Eighth Circuit had used the correct analytical framework in its 2001 decision in *Minn ABC* became more pronounced less than two years after it was decided. This is because in 2003 the Eighth Circuit was presented with an analogous case involving ERISA preemption and apprenticeship standards, yet concluded there was no preemption. In *Wright Electric*, the court held that "the supervision ratio statute was 'outside the area of ERISA's concerns, i.e. reporting, disclosure and fiduciary requirements put in place to protect employee's benefits."[33]

In *Wright Electric*, in an unanimous decision the Eighth Circuit recognized several legal concepts that eluded the majority of the panel in *Minn ABC*. First, it held that *Boise Cascade* was no longer controlling in light of this Court's decision in *Travelers*, and second, it recognized this Court's shift away from "strict textualism" in ERISA preemption cases.[34] Lastly, it recognized that a statute regulating apprentice supervision was outside of the area of ERISA's concerns.[35]

As a result, the nature and extent of any conflict with the Eighth Circuit and its decision in *Minn ABC* is uncertain given the Circuit's subsequent decision in *Wright Electric*, which employs the same ERISA analysis used by the court of appeals below. In short, the

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[33] *Wright Electric*, 322 F.3d 1025, 1032, citing *Wilmar*, 212 F.3d at 538.

[34] *Wright Electric*, 322 F.3d at 1029.

[35] *Wright Electric*, 322 F.3d at 1032.

perpetuation of any conflict caused by *Minn ABC* is called into question by *Wright Electric*, which raises the issue whether the Eighth Circuit would reconsider the propriety of its decision in *Minn ABC* if that case were re-presented today. Because the Eighth Circuit's jurisprudence on this question is in flux any conclusion that there exists a direct conflict warranting this Court's review is mistaken. If there is a conflict, it is an insubstantial one. Moreover, given the unresolved differences in these Eighth Circuit decisions, the exact nature of a conflict is not fully defined. Hence any further review by this Court would be premature.

3. The Minnesota statute in *Minn ABC* is factually distinguishable from Michigan's statute.

The factual differences between this case and *Minn ABC* also make this case a poor vehicle for resolving a circuit conflict, if one exists.

Unlike Michigan's equivalency provision, which creates no standards of its own, but simply requires approval under federally equivalent standards, the Minnesota statute in *Minn ABC* required approval under exclusively State created rules which "set out in very specific detail the length of an apprenticeship program, responsibilities of an apprentice, how an apprentice should be supervised, schedule of work processes, wage schedules, the amount of hours of related instruction required and the hours of work required."[36]

These distinctions are important, because to properly evaluate the Minnesota statute for the purpose

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[36] *Minn ABC*, 267 F.3d at 814.

of ERISA preemption, *each* requirement has to be reviewed separately to determine if it mandates an area intended to be vacated by ERISA.

Furthermore, ABC's position that Michigan's statutory provisions present impermissible "mandates" whereas the federal requirements emanating from the Fitzgerald Act[37] are voluntary, Pet. App. 12a, are of no import, as the "mandates" of the Michigan statutory provisions do not fall within the area that Congress intended ERISA to control exclusively.

[37] National Apprenticeship Act of 1937, 28 U.S.C. § 50.

III. The determination of the court of appeals that DLEG's motion to dissolve the injunction was timely does not warrant further review by this Court.

A. The court of appeals correctly held that the district court did not abuse its discretion.

The Sixth Circuit's determination that the district court did not abuse its discretion in determining that DLEG's Motion to Dissolve Injunction was timely was correct. The Sixth Circuit properly recognized that Fed. R. Civ. Proc. 60 includes a "reasonable time" provision. In determining that DLEG's motion was filed within a "reasonable time," both the District Court and the Sixth Circuit properly utilized the "flexible standard" announced by this Court in *Rufo v. Inmates of Suffolk County Jail.* [38]

In *Rufo*, this Court established a flexible standard for modification or termination of ongoing injunctions in cases involving "institutional reform." This Court indicated that under the new standard "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree."[39] This Court based the new standard on recognition that old rigid standard was not consistent with principles of equity.

ABC's contention that *Rufo's* relaxed standard is limited to "institutional reform litigation" lacks merit. Several years after *Rufo*, this Court again referenced the "flexible standard" in reviewing 60(b)(5) motions. In *Agostini v. Felton*, this Court cited Rufo's standard generally without limiting it to "institutional reform"

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[38] *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

[39] *Rufo*, 502 U.S. at 393.

cases.[40] *Agostini* did not involve "institutional reform" but it did involve a matter of public interest – litigation involving a public school district. Since then, the general consensus among the courts has been that the "flexible standard" requires some level of public interest.

Litigation involving federal preemption of two provisions of the MEAA plainly involves a public interest. The MEAA is a prime example of the State's effort to protect its citizens pursuant to the State's constitutional powers. Like institutional reform litigation, this Supremacy Clause litigation "reach[es] beyond the parties involved directly in the suit"[41] and affects the Michigan Legislature that enacted the two statutory provisions, the governor that approved the legislation, and the People of the State.

The only remaining question was whether there has been significant changes in the law since the entry of the district court's 1992 Injunction. Here, the court of appeals cited to this Court's analysis in *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*,[42] in support of its finding that a change in law had occurred: "the Supreme Court itself acknowledged differences between the Court's 'earlier ERISA pre-emption cases' and its cases since New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995)." Pet. App. 5a.

The court of appeals properly applied these factors and correctly held that DLEG timely filed its motion to dissolve the 1992 injunction.

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[40] *Agostini v. Felton*, 521 U.S. 203 (1997).

[41] *Rufo*, 502 U.S. at 381.

[42] *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997).

B. There is no significant split among the circuits regarding the application of *Rufo's* "flexible standard."

ABC argues that a circuit split exists regarding application of the *Rufo* standard. ABC properly indicates that the courts in the following cases did not hesitate to extend *Rufo's* standard beyond cases of "institutional reform" from the second, seventh, and ninth circuits: *Patterson v. Newspaper Mail Deliverers' Union of New York*;[43] *In re Hendrix*;[44] *Bellevue Manor Associates v. United States*;[45] and the court of appeals decision, below. Pet. App. 34a-35a.

In attempting to create the appearance of a circuit split, ABC argues that several circuits have refused to apply the *Rufo* standard to cases not involving institutional reform. A closer analysis of those cases, however, reveals that the cases do not support a conflict among the circuits.

First, none of the cases cited by ABC concern a permanent injunction striking down a State law of general application based on legal authority that no longer exists. ABC cannot refute this point – because no such case law exists.

Second, ABC cites two cases as examples of circuits refusing to extend the *Rufo* standard beyond cases of institutional reform. Yet, ABC pointedly ignores that neither case deals with an issue of public interest. As such, they are easily distinguishable from the list of

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[43] *Patterson v. Newspaper Mail Deliverers' Union of New York*, 13 F.3d 33, 38 (2d Cir. 1993).

[44] *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993).

[45] *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999).

cases which indicate that the *Rufo* flexible standard can and should be extended to cases involving the public interest.

Paul Revere Variable Annuity Ins. Co. v. Zang and Beck from the first circuit dealt with an arbitration agreement between private parties. [46] The court indicated that: "The order here resolved a contractual dispute between private parties with *tenuous and tangential bearing at best on the public interest.*"[47]

Similarly, the federal circuit court of appeals in *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.* dealt with a private commercial dispute: "The institutional reform cases present considerations not found in consent decrees settling commercial disputes . . . . [C]ommercial litigants . . . have negotiated a voluntary contract that has simply been accepted by the court in termination of litigation."[48]

Like the ERISA preemption issue discussed above, there is no indication of any widespread confusion or lack of uniformity in the federal courts with regard to the application of *Rufo's* flexible standard in cases involving a matter of public interest. This case does not present the "compelling reasons" required by Supreme Court Rule 10 for grant of certiorari.

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[46] *Paul Revere Variable Annuity Ins. Co. v. Zang and Beck*, 248 F.3d 1, 7 (1st Cir. 2001).

[47] *Revere*, 248 F.3d at 7 (emphasis added).

[48] *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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